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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1003

COUNTY OF IMPERIAL AND THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

Appeal From United States District Court, Southern District of California.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JAMES H. HARMON, *County Counsel, County of Imperial,*

County of Imperial Courthouse,
El Centro, Calif. 92243,
(714) 352-3610 Ext. 250,

Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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vs.

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Respondents.

Appeal From United States District Court, Southern District of California.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners are the County of Imperial, a political subdivision of the State of California, and the Superior Court of the State of California in and for the County of Imperial. For convenience, said Petitioners are sometimes referred to herein as "County" and "Superior Court", respectively. Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on July 26, 1979.

Opinions Below.

The opinion of the Court of Appeals is reported at 604 F.2d 1174 (9th Cir. 1979) and is attached hereto as Appendix "A". The unreported Order Granting Motion for Preliminary Injunction and Preliminary Injunction of the District Court are set forth in Appendix "B".

Jurisdiction.

The judgment of the Court of Appeals was entered on July 26, 1979. A timely petition for rehearing was denied on October 17, 1979, and this petition for certiorari was filed within 90 days of said date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Where the California Supreme Court held the owner of a water well estopped from challenging a restriction in his use permit prohibiting out-of-county sale of water and bound by the restriction, and where this Court dismissed the well owner's appeal, may third party merchants engaged in purchase of water for export to Mexico invoke the jurisdiction of the Federal Courts to enjoin enforcement of the State Court judgment?

Statutory Provision Involved.

The statutory provision involved in this case is the "Anti-Injunction Act", which is contained at 28 U.S.C. §2283. Said Act provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

Statement of the Case.

In 1967, W. Erle Simpson was issued a use permit by the County authorizing the sale of water from a well on his premises, which was located in a residential subdivision. The permit contained a condition that water from the premises could only be sold for use within the County.

In June, 1972, Donald C. McDougal, hereinafter referred to as "McDougal", purchased the premises and, without obtaining a new permit, commenced selling water which was exported by tank truck to Mexico. The County sought injunctive relief in the Superior Court.

The Superior Court rejected McDougal's contention that the use permit export restriction violated the Commerce Clause of the United States Constitution. After trial, a permanent injunction was granted enjoining McDougal and all persons acting in concert with him from ". . . conducting a trucking operation on the premises similar to that which occurred on or about June 30, 1972".

On appeal, McDougal renewed his challenge to the use permit restriction on grounds it violated the Commerce Clause. However, the State Court of Appeal affirmed the Superior Court judgment and the California Supreme Court granted hearing.

The State Supreme Court partially affirmed the judgment by holding McDougal bound by the export restriction and estopped from challenging its validity. *County of Imperial v. McDougal*, 19 Cal.3d 505, 138 Cal. Rptr. 472, 564 P.2d 14 (1977). A copy of the *McDougal* decision is attached hereto as Appendix "C".

The estoppel against McDougal resulted from facts showing that the out-of-county sale restriction was not

challenged by Mr. Simpson and that his request to export water to Mexico was voluntarily withdrawn from the permit application. (C-6.) Due to the estoppel, the California Supreme Court concluded it was unnecessary to determine whether the export restriction was violative of the Commerce Clause, as urged by McDougal. (C-6.) Petition for rehearing, filed by McDougal, was denied. (C-11.)

McDougal appealed to this Court and also applied for stay and supersedeas. The application was denied on October 17, 1977. *Donald C. McDougal v. County of Imperial,* No. 77-471. The appeal was dismissed for lack of a substantial federal question, on November 14, 1977. (434 U.S. 899, 54 L.Ed.2d 187, 98 S.Ct. 294.)

Respondents Gallego Munoz, Martinez, and de Leon are residents of Mexico who had contracts for purchasing water from McDougal and were exporting water to Mexico. In July, 1977, they filed the instant action in the Federal District Court seeking to enjoin the County, certain of its officers, and the Superior Court from enforcing the use permit export restriction. Respondents alleged the restriction violated the Commerce Clause of the United States Constitution and asserted the State Courts erred in the *McDougal* decision.

In response to Respondents' motion for preliminary injunction, the County urged the District Court to deny relief and to dismiss, on grounds the decision of the California Supreme Court was *res judicata* and that the federal action was further barred by 28 U.S.C. §2283. The District Court, however, issued a preliminary injunction enjoining the County and its officers from enforcing the condition in the use permit held by McDougal.

McDougal thereafter resumed sales of water for export to Mexico. The County unsuccessfully sought a stay and appealed to the Court of Appeals for the Ninth Circuit. During pendency of the federal appeal, the Superior Court found McDougal in contempt of its judgment, but stayed execution of the contempt order.[1]

In affirming the District Court, the Court of Appeals concluded that because the California Supreme Court had not determined whether the County could constitutionally restrict export of water, its decision did not bar Respondents' action. (A-7.) The Ninth Circuit also rejected the County's argument that Respondents' action was barred by the Anti-Injunction Act. (A-5, 6.) Finally, the Court of Appeals directed that the District Court should determine the validity of the export restriction in light of *Hughes v. Oklahoma*, ... U.S. ....., 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979). (A-4.)

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[1]The text of the Superior Court's Contempt Judgment and Order Clarifying Stay of Execution Provisions in Contempt Judgment are attached as Appendix "D". McDougal challenged the contempt holding in the State Court of Appeal and that Court is awaiting action by this Court before ruling (California Court of Appeal, Fourth Appellate District, Case No. 18915).

REASONS FOR GRANTING THE WRIT.

I

The Decision of the Court of Appeals Directly Conflicts With the Holding of the California Supreme Court in the McDougal Case.

The California Supreme Court held McDougal estopped from challenging the export restriction in his use permit and bound by its terms. *County of Imperial v. McDougal* (*supra*). The Court specifically stated:

> ". . . [A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (citations omitted.) Thus, McDougal is estopped to assert that the prohibition . . . against the sale of water for use outside the county is invalid, and he is bound by the limitation." (C-6.)

The foregoing holding was based on facts adduced at trial establishing that Mr. Simpson, McDougal's predecessor, did not challenge the prohibition against out-of-county water sales. (C-6.) Simpson was represented by counsel and voluntarily withdrew from his application a request to export water to Mexico. (*Id.*)

The State Supreme Court also rejected McDougal's attempts to raise new contentions by petition for rehearing, as follows:

> "McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of

> rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court" (citing authorities). (C-11.)

This Court granted the County's motion to dismiss McDougal's appeal. (434 U.S. 899, 54 L.Ed.2d 187, 98 S.Ct. 294 (1977).[2]

Respondents, however, alleged in their federal complaint *inter alia* "[t]he action of [the] County of Imperial, the State Supreme Court of California and the Superior Court . . . is in direct contradiction to and is invalid pursuant to [the Commerce Clause] of the United States Constitution . . ."[3] Based on the Respondents' motion, the District Court enjoined the County and its officers from enforcing the export restriction in McDougal's use permit. (B-12.)

Said injunction issued by the District Court, and affirmed by the Court of Appeals, is in direct conflict with the *McDougal* decision of the California Supreme Court. The State Court decision holds the export restriction in McDougal's use permit is enforceable—the Federal Court order enjoins enforcement of the restriction.

The legal labyrinth created by the aforesaid conflict is manifested by the Superior Court's contempt judg-

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[2]The County's motion was brought under Rule 16(b) of the Rules of this Court and cited authorities stating the Court has consistently refused to grant jurisdiction on appeal from a state court judgment resting on an adequate non-federal ground (*see*, for example, *McCoy v. Shaw*, 277 U.S. 302, 72 L.Ed. 891, 48 S.Ct. 519 (1927) and Stern and Gressman, Supreme Court Practice (5th Ed., 1978), pp. 230-245.)

[3]Respondents' pleadings and other documents are lodged with the Court of Appeals.

ment wherein the Court found ". . . McDougal is knowingly selling water . . . for distribution and use outside the County . . . particularly in Mexico" and ruled "[s]uch sales . . . constitute willful disobedience of the Judgment of th[e] Court . . ." (D-2.) It is a matter of public importance that this Court grant this petition and resolve the jurisdictional conflict.

II

The Court of Appeals Erred in Not Recognizing the Decision of the California Supreme Court as a Bar to Respondents' Action.

A. Enforceability of the Export Restriction Was Fully Adjudicated in the McDougal Case and Said Decision Therefore Constitutes a Final Judgment "on the Merits".

In response to the County's assertion the holding of the California Supreme Court was *res judicata* as to Respondents' action, the Court of Appeals stated "[a] review of the . . . decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by the court. (Citation omitted.) There is thus no valid final judgment on the merits existing as to the cause of action in the instant case". (A-7, 8.)

The aforesaid reasoning is fallacious.

Enforceability of the subject export restriction *was* the central issue in the *McDougal* litigation. Throughout the state court proceedings, McDougal attempted to challenge the constitutionality of the restriction. Further, Respondent Gallego Munoz participated as a declarant in the state court proceedings and joined in raising

the Commerce Clause issue as *amicus curiae* before the State Supreme Court.[4]

The California Supreme Court upheld the enforceability of the out-of-county sale restriction in McDougal's use permit based on the theory of estoppel. Estoppel *is* a valid and substantive ground for a state court decision.

In *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318 (1916), this Court refused to disturb a decision of the Nebraska Supreme Court based on estoppel and dealing with the relative rights of parties to divert river water for irrigation. Discussing the Nebraska Supreme Court decision, the Court stated:

> "As has been shown, several questions were presented to the supreme court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a Federal question and the other as plainly non-Federal . . . In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it (citations omitted).
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> * * *

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[4]A copy of the *Amicus Curiae* Brief of Guillermo Gallego Munoz is in the record below.

"It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment." (243 U.S. 157, 163-165.)[5]

Respondents hold no special use permit authorizing commercial water sale operations in the County. Any right they have to purchase water from McDougal's property is necessarily derivative of rights under the latter's use permit.[6]

Respondents' action does *not* challenge an ordinance or County-wide policy prohibiting water export. Instead, it attacks the constitutionality of the condition in Mc-

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[5]Estoppel was found to be an adequate and independent state ground in all of the following cases: *Pierce v. Somerset Railway,* 171 U.S. 641, 43 L.Ed. 316, 19 S.Ct. 64 (1898); *Lowry v. Silver City Gold and Silver Mining Co.,* 179 U.S. 196, 45 L.Ed. 151, 21 S.Ct. 104 (1900); *Utley v. City of St. Petersburg,* 292 U.S. 106, 111-112, 78 L.Ed. 1155, 54 S.Ct. 593 (1933); *Beals v. Cone,* 188 U.S. 184, 196, 47 L.Ed. 435, 23 S.Ct. 275 (1903); *Hale v. Lewis,* 181 U.S. 473, 479-480, 45 L.Ed. 959, 21 S.Ct. 677 (1901); *Gillis v. Stinchfield,* 159 U.S. 658, 40 L.Ed. 295, 16 S.Ct. 131 (1895); *Michigan v. Flint,* 152 U.S. 363, 368, 38 L.Ed. 478, 14 S.Ct. 586 (1894); *Israel v. Arthur,* 152 U.S. 355, 362, 38 L.Ed. 474, 14 S.Ct. 583 (1894); *Sherman v. Grinnell,* 144 U.S. 198, 202, 36 L.Ed. 403, 12 S.Ct. 574 (1892); *Marrow v. Brinkley,* 129 U.S. 178, 181, 32 L.Ed. 654, 9 S.Ct. 267 (1888); *Adams County v. Burlington and Mo. River Railroad Co.,* 112 U.S. 123, 127-129, 28 L.Ed. 678, 5 S.Ct. 77 (1884).

Two additional cases, in which state court decisions based on estoppel, were held to have been decided on adequate state gounds are of particular interest. In *Mobile, Jackson and Kansas City R. Co. v. Mississippi,* 210 U.S. 187, 204, 52 L.Ed. 1016, 28 S.Ct. 650 (1907) and *Rutland Railroad Co. v. Central Vermont Railroad Co.,* 159 U.S. 630, 640, 40 L.Ed. 284, 16 S.Ct. 113 (1895), this Court rejected appeals on said grounds even though interference with interstate commerce was alleged.

[6]The State Supreme Court observed that the terms of a conditional use permit run with the particular land. *County of Imperial v. McDougal* at C-5 citing *Cohn v. Board of Supervisors,* 135 Cal.App.2d 180, 184, 286 P.2d 836 (1955).

Dougal's use permit—a restriction already held enforceable by the California Supreme Court.

Since the State Supreme Court decision upholds the enforceability of the very export restriction challenged by Respondents, the decision must be deemed "on the merits" as to the Respondents' cause of action. In *Hatchitt v. United States,* 158 F.2d 754, 755 (9th Cir. 1949), the Court of Appeals held as follows:

> "It is well settled that a valid and final judgment may be successfully pleaded in bar against any subsequent action between the same parties dealing with the same right as to the same res. That the muniment of right in each case is different does not militate against the application of the rule, so long as the general type of right in the identical res is the same."

Respondents cannot logically acquire greater rights respecting the subject land than the owner. Since McDougal is prohibited from selling water for export from the premises, it must follow that Respondents may not purchase water from him for transport from the premises to Mexico.

McDougal's remedy was to make a direct attack of the State Supreme Court decision by appeal to this Court. He did so without success. Respondents may not properly relitigate the issue earlier adjudicated through collateral attack. (Moore's Federal Practice, §0.407, pages 931-932.)

B. The Anti-Injunction Act Prohibits the Federal Courts From Enjoining Enforcement of the Decision in the McDougal Case.

The "Anti-Injunction Act", 28 U.S.C. §2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Court of Appeals recognized "[t]he prohibition of [the Act] . . . is against a stay of 'proceedings in any court of a state'. That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process". (A-5, quoting *Hill v. Martin,* 296 U.S. 393, 403, 80 L.Ed. 293, 298, 56 S.Ct. 278, 281 (1935).)

The Court concluded, however, ". . . there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal.* McDougal has complied with the California Supreme Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County". (A-5, 6.)

Said conclusions badly misapprehend facts and law.

Compliance with the judgment of the California Supreme Court requires that McDougal *not* sell water to Respondents for export. The preliminary injunction granted by the District Court enjoins enforcement to allow sales by McDougal in violation of the State Court judgment.

There *are* acts which the State Courts may take to effectuate the judgment in the *McDougal* case. The Superior Court's contempt order is illustrative of such enforcement powers. As hereinafter shown, the District Court's injunction is barred by the Anti-Injunction Act.

The Court of Appeals further stated "[m]oreover, even if ongoing state proceedings remain, [respondents] here, not being parties in the state suit, may mount a constitutional challenge in federal court against *the law* which is the subject of these state proceedings". (A-6, with emphasis added, citing *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 83 L.Ed. 771, 59 S.Ct. 526 (1938), for the proposition third parties are not prevented by the Anti-Injunction Act from challenging a statute on constitutional grounds where the statute is also under litigation in the state courts.)

In *Hale v. Bimco Trading, Inc.*, action was brought in the Florida Supreme Court to compel enforcement of a statute requiring inspection and fees for imported cement. (306 U.S. 375, 377.) Prior to entry of final judgment by the state court, Appellee Bimco Trading, Inc., a stranger to the state proceedings, commenced a separate action in the federal courts to enjoin enforcement of the statute. The Florida Supreme Court agreed to stay all further proceedings ". . . until the final decision of the Supreme Court of the United States . . ." (*Id.*) Thereafter, this Court affirmed the lower federal court's injunction against enforcement of the statute.

In stark contrast to the *Hale* case, the California Supreme Court in *McDougal* finally adjudicated the enforceability of the subject export restriction, and this Court dismissed McDougal's appeal, *before* any action was commenced in the District Court.

Moreover, *Hale* involved an action by a third party stranger to enjoin enforcement of a state statute. The present litigation does not involve any statute or ordinance of general application; instead, it deals with a special permit involving a single parcel of land. Further, Respondents are *not* strangers. They are contractors of McDougal; and, as noted, one of the Respondents actually participated as a declarant and as *amicus curiae* in the state court proceedings.

Application of the Anti-Injunction Act was recently discussed by this Court in *Vendo Co. v. Lektro-Vend Corporation,* 433 U.S. 623, 53 L.Ed.2d 1009, 97 S.Ct. 2881 (1977). In *Vendo,* after nine years of litigation in the Illinois courts, the Supreme Court of Illinois affirmed a money judgment in favor of Vendo Company. Shortly thereafter, Lektro-Vend Corporation petitioned the U.S. District Court to enjoin state proceedings to collect the judgment. The District Court granted that request and the Court of Appeals affirmed.

This Court reversed, finding that the injunction was barred by the Anti-Injunction Act. Specifically, the Court determined the Clayton Act did not authorize the federal injunction under the "expressly authorized" exception to §2283.

In the course of its opinion, the Court emphasized the inflexible nature of the Act stating that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy". (433 U.S. 630.) The Court also addressed the argument the injunction was necessary in aid of the District Court's jurisdiction and rejected said rationale, stating:

"[n]o case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception". (*Vendo Co. v. Lektro-Vend Corporation,* 433 U.S. 623, 630.)

In *Vendo,* this Court referred to the Anti-Injunction Act as an "absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act". (433 U.S. 630.) The Court stated flatly "[It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation". (433 U.S. 630 citing *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 514, 99 L.Ed. 600, 75 S.Ct. 452 (1944).)

Although Respondents in the present case sought to additionally enjoin the Superior Court, the District Court tailored its preliminary injunction toward the County and its officials. Anti-Injunction Act cases, however, have consistently held that a restraint against the parties rather than against the court itself does not make the action any less a violation of 28 U.S.C. §2283.

Beginning with *Union Central Life Ins. Co. v. Mc Aden, et al.,* 21 F.Supp. 110 (5th Cir. 1937), federal courts have criticized this technique. In *H. J. Heinz Co. v. Owens,* 189 F.2d 505 (9th Cir. 1951), the Court of Appeals denied a motion for an injunction stating: "[t]his statutory prohibition is not avoided by framing an injunction as a restraint on a party rather than directly against the state court itself". (Also see *Furnish v. Board of Medical Examiners,* 257 F.2d 520 (9th Cir. 1958).)

C. Direction by the Court of Appeals for the District Court to Rely on Hughes v. Oklahoma Is Erroneous.

The Court of Appeals directed that the District Court's decision ". . . regarding the merits of the Commerce Clause question" should be made in light of *Hughes v. Oklahoma,* ..... U.S. ....., 60 L.Ed. 2d 250, 99 S.Ct. 1727 (1979). (A-4.) Said direction is inapposite.

The appellant in *Hughes* was convicted of violating an Oklahoma statute which prohibited the export outside the state of minnows procured from state waters. He directly attacked the conviction by challenging the constitutionality of the statute before this Court. This Court assumed jurisdiction and determined the statute violative of the Commerce Clause. (*Hughes v. Oklahoma, supra.*)

Obviously, *Hughes* is distinguishable from the present case. The former involved no *res judicata* or Anti-Injunction Act questions.

In *Hughes,* the Appellant was successful in a direct attack on the state court judgment. McDougal's direct attack failed.

Hughes involved a challenge to a state-wide statute. The present case does *not* involve any statute or ordinance of general application prohibiting export of water. At issue is the enforceability of a special use permit restriction affecting a single parcel.

Since the California Supreme Court ruled the restriction in McDougal's use permit is enforceable, and this Court dismissed McDougal's appeal, there should be no "Commerce Clause question". Assuming *arguendo* Respondents do have standing, it is not clear that *Hughes v. Oklahoma* should control.

In *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 52 L.Ed. 828, 28 S.Ct. 529 (1908), this Court sustained a New Jersey statute preventing the exportation of water from its boundaries. There a resident of New Jersey contracted to provide water from New Jersey streams to New York City. Subsequently, the State of New Jersey, reciting the need for preserving the fresh water of the state for the health and prosperity of its citizens, enacted a statute requiring:

> ". . . it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein".

The effect of the New Jersey statute was to prevent the plaintiff from supplying water to New York pursuant to its contracts. Plaintiff sued to have the statute invalidated on grounds it was not reasonably related to its stated purposes and the legislature had transcended its authority by interfering with interstate commerce. (209 U.S. at 354.)

The lower court upheld the New Jersey statute on the basis the defendant enjoyed only the rights of a riparian owner and the statute was justified as prohibiting such a riparian from taking more water from the stream than its just share. This Court affirmed the validity of the New Jersey statute, and Chief Justice Oliver Wendell Holmes, who wrote the opinion, stated as follows:

> ". . . [I]t appears to us that few public interests are more obvious, indisputable, and independ-

ent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 356.

Conclusion.

The decision of the California Supreme Court in the *McDougal* case should be *res judicata* as to Respondents' action. Respondents' action is also barred by the Anti-Injunction Act. The injunction of the District Court, affirmed by the Court of Appeals, is in direct conflict with the final decision of the California Supreme Court. It is of critical importance that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

JAMES H. HARMON, *County Counsel,*
County of Imperial,
Attorney for Petitioners.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Guillermo Gallego Munoz; Humberto Martinez, Lic. Juan de Leon, Plaintiffs-Appellees, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon; Luis Legaspi; John Kennerson; James Bucher; Tunney Williams; Herman M. Sperber; J. Leonard Speer; Donald Courtney McDougal, Defendants-Appellants. No. 77-3293.

[July 26, 1979].

Appeal from the United States District Court for the Southern District of California.

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judge.

PER CURIAM:

Appellants County of Imperial (County) and its officials challenge in this appeal a preliminary injunction entered by the district court enjoining the County from enforcing a condition a use permit held by one Donald C. McDougal. The condition prohibits the sale of water from McDougal's land for use outside the County of Imperial. We affirm the preliminary injunction. To explain our holding, we include the pertinent historical facts leading up to the instant litigation.

McDougal, who is not a party in this appeal, owns certain real property in the County of Imperial in southern California. When he purchased the property,

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*Honorable Walter E. Hoffman, Senior United States District Judge, for the District of Virginia, sitting by designation.

he also received a conditional use permit that allowed the commercial sale of water under the County's zoning law. As a condition to this sale, the permit required that the water be sold only for use in Imperial County.

The previous owner made little use of the water sale rights, but McDougal increased the operation substantially. When the neighbors complained about the increased business activity, the County brought suit in the California Superior Court to enjoin McDougal's water sales. The County alleged that McDougal was violating the conditional use permit by selling water for export outside the county and by employing large tank trucks which made noise and created fumes and dust.

The county was successful in its action and McDougal was enjoined from conducting a trucking operation of the type he started after purchase of the property. On appeal, the California Supreme Court partially affirmed the lower court's holding. *County of Imperial v. McDougal,* 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14 (1977). The court upheld the export restriction in the conditional use permit by finding that it could not be challenged by McDougal. According to the court:

> "[A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit (citations omitted). Thus, McDougal is estopped to assert that the prohibition . . . against the sale of water is invalid, and he is bound by the limitation." 564 P.2d at 18.

The court specifically added, in a footnote to this quote, that in view of this holding it did not need to reach the constitutional question as to whether the permit's prohibition on the export of water was valid. 564 P.2d at 18, n.3. Finally, the court reversed the trial court's determination that the export limitation also prohibited McDougal from conducting a large-scale water sale operation. The court found the limitation not to be a regulation of land use but rather a condition upon the sale of a commodity, specifically a prohibition against the sale of water outside the County. 564 P.2d at 19.

Following this ruling, McDougal reopened the well. Pursuant to the California Supreme Court ruling upholding the export restriction, McDougal has, since the reopening, required each purchaser of water to sign an affidavit that the water being bought will be used only in Imperial County.

Appellees Munoz, Martinez and deLeon are Mexican merchants who had contracts for purchasing water from McDougal and were exporting the water to Mexico. When they returned to purchase water after the reopening of the well, McDougal refused to sell it to them because of the terms of his conditional use permit. Appellees then filed the instant action in federal district court and applied for a preliminary injunction. The injunction sought to keep the County from enforcing the out-of-county sale restriction on the ground that it violated the Commerce Clause, Article I, § 8, cl. 3, of the United States Constitution. The court ruled in appellees' favor and enjoined the County from enforcing the no export term of the conditional use permit. The County appeals from this order.

The district court found the elements necessary for the granting of preliminary injunctive relief—irreparable injury, probable success on the merits,[1] balance of equities in plaintiff's favor, and presence of a public interest, *see Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers,* 584 F.2d 308, 314-15 (9th Cir. 1978); *Sierra Club v. Hathaway,* 579 F.2d 1162, 1167 (9th Cir. 1978)—to be present in this case. The County does not challenge these findings, but argues instead that the California state court proceedings preclude the district court from issuing an injunction.

The County claims that under the Anti-Injunction Act, 28 U.S.C. § 2283, the existence of the state proceedings removes the district court's power to issue the preliminary injunction. The Anti-Injunction Act provides:

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[1]The district court found the restriction on the sale of water outside Imperial County to be on its face a direct prohibition against interstate commerce in the water. Consequently, the court found it likely that appellees would succeed on the merits of their contention that the restriction in the use permit violates the Commerce Clause.

While we do not reach the merits of the Commerce Clause question, we note that subsequent to the issuance of the district court injunction, the United States Supreme Court decided *Hughes v. Oklahoma,* 99 S.Ct. 1727 (1979). In *Hughes v. Oklahoma,* the Court struck down an Oklahoma statute which prohibited the export outside of the State of minnows procured from state waters. The Court found that the statute "on its face discriminates against interstate commerce" and that "[s]uch facial discrimination by itself may be a fatal defect, regardless of the State's purpose . . . . At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 99 S.Ct. at 1737.

The district court's decision regarding the merits of the Commerce Clause question should be made in light of *Hughes v. Oklahoma.*

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The district court found the Anti-Injunction Act not to be a bar because there was no pending state court proceeding which would be enjoined by the federal injunction. The County argues that there was still a pending proceeding in the enforcement of the California Supreme Court judgment. In *Hill v. Martin,* 296 U.S. 393 (1935), the United States Supreme Court stated:

> "The prohibition of § 265 [the precedessor to the present 28 U.S.C. § 2283] is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . . It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." 296 U.S. at 403. (footnotes omitted).

Recently, in *Vendo v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), the Supreme Court applied this rule and overturned a lower federal court order which enjoined the collection of a state court money judgment.

In the instant case, however, there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal.* McDougal has complied with the California Supreme

Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County. No further proceedings or enforcement provisions of the California Supreme Court decision remain which may be affected by the district court injunction. Moreover, even if ongoing state proceedings remain, appellees here, not being parties in the state suit, may mount a constitutional challenge in federal court against the law which is the subject of these state proceedings. In *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939), the Supreme Court held that third parties are not barred under the Anti-Injunction Act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state courts. Finally, the district court's injunction did not violate the rule that "the prohibition of § 2283 cannot be evaded by addressing the order to the parties" rather than to the state court. *Atlantic Coast Line R.R. v Bhd. of Locomotive Engineers,* 398 U.S. 281, 287 (1970). Appellees in their complaint sought to enjoin, in addition to the County and its officers, the California Superior Court from interfering with their right to purchase water from McDougal. The district court enjoined only the County and its officers and specifically added in its order that it "wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water." (emphasis in original). The purpose of excluding the California Superior Court from the injunction, however, is not to avoid impermissibly the effects of the Anti-Injunction Act. Instead the injunction excludes the California courts because those courts are not now faced with the issue of the constitutionality of the zoning ordinance. The injunction is

directed against the County, the only body claiming that the zoning ordinance and its conditional use permit are constitutional. In such circumstances, the district court's issuance of the injunction against the County is not an attempt to circumvent the effect of the Anti-Injunction Act. We find that the Anti-Injunction Act does not bar the instant federal injunction.

The County's additional argument, that the instant action is precluded by the *res judicata* effect of the state court proceedings, must also be rejected. Under the doctrine of *res judicata*, a final valid judgment rendered on the merits is binding on the parties or their privies so as to prevent them from relitigating the same case in either the same or a different forum. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978). "Before the doctrine may apply, there must be (1) a valid, final judgment, (2) rendered on the merits, (3) a subsequent action involving the same parties or those in privity with them, (4) that is based on the same cause of action or claim." *Hooker v. Klein*, 573 F.2d at 1367. The parties, focusing on the third element of this formula, have argued the question of whether appellees are in privity with McDougal so as to be bound by the California Supreme Court judgment against him. We need not reach this question, however, for we find that the other necessary elements of *res judicata* are missing here. A review of the California Supreme Court decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by that court. *See County of Imperial v. McDougal*, 564 P.2d at 18, n.3. There is thus no valid final judgment on the merits existing as to the cause of action in

the instant case. As a result, the California Supreme Court decision would not have a *res judicata* effect in a case where proper parties, including even those in privity with McDougal, are directly challenging the permit's validity on constitutional grounds. Since the doctrine of *res judicata* extends only to issues that have been litigated on their merits, *see Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Hooker v. Klein*, 573 F.2d at 1367, it is not applicable in this case.

The judgment of the district court is AFFIRMED.

APPENDIX B.

Order Granting Motion for Preliminary Injunction.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, et al., Plaintiffs, v. County of Imperial; et al., Defendants. Civil No. 77-491-T.

The plaintiffs' motion for a preliminary injunction was heard on August 8, 1977. The plaintiffs appeared by Murry Luftig, Esq., and William Kronberger, Esq., Donald McDougal, Jr., Esq., appeared for defendant McDougal and James Harmon, Esq., appeared for the County of Imperial and for the other defendants. For the reasons and upon the conditions set forth below, the court grants the motion.

Facts

In 1967, one Simpson purchased a certain tract of land located in Imperial County and erected thereon a well. He applied for a use permit which would authorize the commercial sale of water from the well and the permit was granted with this condition: "[t]he water will be sold only for use within the Imperial County." Following the grant of the permit, Simpson sold water on a very small scale. Then in 1970 the land was zoned Open Space (S), requiring a conditional use permit for development of natural resources for commercial purposes.

In June, 1972, defendant McDougal bought the land from Simpson and soon the neighbors began to complain about increased operation of the well. In time the County filed suit against McDougal, seeking injunctive relief. Evidence was offered to the effect that McDougal had greatly expanded the scale of operation of the

well by selling water for use in Mexico; there was evidence of heavy traffic in large tank trucks at all hours of the day and night, and these trucks were accused of generating noise, fumes, dust and other unpleasantness.

The Superior Court of Imperial County enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972," based on its conclusion that McDougal's activities violated the 1970 zoning law.

The case was appealed and the California Supreme Court held that the restriction in the use permit prohibiting sale of water for use outside Imperial County could not be challenged by McDougal. *County of Imperial v. McDougal,* 19 Cal.3d 505 (1977), *reh. denied,* 19 Cal.3d 619b (1977). Following this ruling, McDougal reopened the well. In obedience to the injunction entered by the Superior Court, McDougal has, since the reopening, required each purchaser of water to sign an affidavit that the water being bought will be used only in Imperial County.

The plaintiffs, who had bought water from McDougal for transportation to Mexico during 1972, appeared at the well and offered to buy water. They refused to sign the affidavit and McDougal refused to sell them water. They now seek injunctive relief restraining the County and the Superior Court from interfering with their right to purchase water and requiring McDougal to sell water to them.

Jurisdiction

The defendants raise 28 U.S.C. §2283 (the "Anti-Injunction Act") as a bar to this proceeding. However, what is really being sought in this lawsuit is not to

enjoin a pending state court proceeding but rather to restrain the enforcement of an allegedly unconstitutional ordinance. It seems obvious that this court may, if otherwise appropriate, restrain the operation of an unconstitutional statute; surely it does not lose the right to do so merely because the statute has been tested in the state courts. In *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939), the Supreme Court held that a third party was not barred from challenging a statute merely because the same statute was also under litigation in the Florida courts. *Hale* is controlling here and this court concludes that section 2283 does not bar this lawsuit.

The defendants also argue that the proper method of attacking the California Supreme Court decision is by writ of certiorari to the United States Supreme Court, rather than by this lawsuit. However, the plaintiffs herein do not have the option of requesting such a writ. They are not parties to the state court action and can do nothing to appeal or otherwise influence the result. Hence the plaintiffs may proceed with the case in this court.

Res Judicata

The defendants vigorously argue that the state court proceedings in this case are *res judicata*. Under the doctrine of *res judicata*, a final valid judgment is binding on the parties so as to prevent them from re-litgating the same case in either the same or a different forum. The one issue presented by the doctrine of *res judicata* as applied in this case is identity of the parties; if the parties are identical to those involved in the state litigation, then *res judicata* will bar this lawsuit.

For purposes of the doctrine of *res judicata,* "identity of parties" actually means either the identical parties to the first lawsuit, or those in "privy" with them. The plaintiffs herein were not parties to the California lawsuit, but the defendants contend that these plaintiffs are in privy with McDougal and hence are bound by the decision of the California courts.

First, the defendants point out that the plaintiffs filed an *amicus* brief with the California Supreme Court favoring McDougal's presentation there. However, an appearance as *amicus* is insufficient to bind the one so appearing to the result of the case. 1B Moore's Federal Practice 2d ¶0.411[1], page 1253; *Brown-Crummer Investment Co. v. Paulter,* 70 F.2d 184 (10th Cir. 1934).

Second, the defendants urge that the extent of involvement between the plaintiffs and McDougal is sufficient to place them in privy with one another. The resolution of this contention requires a careful definition of what is at issue in this lawsuit.

Initially, we note "There is no generally prevailing definition of privity that can be automatically applied to all cases involving the doctrine of res judicata," 29 Cal.Jur.2d, Judgments §269, and "the determination of who are privies requires careful examination into the circumstances of each case as it arises," 50 C.J.S. Judgments §788. Neither party has cited, and the court has failed to find, any cases sufficiently close the facts of this case as to constitute controlling precedent. Accordingly, some general principles or privity and *res judicata* will now be examined.

An adjudication of property rights binds the parties to the judgment and their successors in interest. Accordingly, it is said that those successors are privies to

the judgment. 50 C.J.S. Judgments §788. Privity sometimes means "a mutual or successive relationship to the same rights of property, such an identification in interest of one person with another as to represent the same legal rights," 29 Cal.Jur.2d Judgments §269. "It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title," 46 Am.Jur.2d Judgments §532, and "privity relates to persons in their relation to property and not to any question independent of property, and to make one a privy to an action, so as to bar him by the adjudication, he must have acquired an interest in the subject matter of the action," 50 C.J.S. Judgments §788.

The common theme running through all of the above citations, as well as through the various court decisions dealing with the problem of privity, is a common interest in property, which property is the subject matter of litigation. But the plaintiffs herein have no common property interest with McDougal. At issue in the state proceeding was McDougal's use permit; the use permit is a part of the land and runs with the land, as the California Supreme Court expressly held. The plaintiffs have no property interest in McDougal's land or in his use permit. Their interest is in the steps taken by the County to enforce what they perceive as an unconstitutional ordinance. Therefore, since the property interest which was litigated in the state courts was exclusively McDougal's and not the plaintiffs,' it must follow that the plaintiffs were not in privity with McDougal and his state court judgment does not bar them from proceeding with this lawsuit.

The Elements of Injunctive Relief

The traditional elements of injunctive relief include the following, all of which a plaintiff must satisfy if he is to have the relief he seeks:

(a) Irreparable injury,

(b) Probable success on the merits,

(c) Balance of equities in the plaintiff's favor, and

(d) Granting the injunction is in the public interest.

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975).

In cases challenging the constitutionality of statutes or other legislative enactments, the first two elements predominate, *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98 (1948), although the court may not disregard the public interest, *Yakus v. United States*, 321 U.S. 414, 440 (1944). Accordingly, the elements of relief will each be examined in the context of the present controversy.

Irreparable Harm

A plaintiff who would be granted an injunction must first satisfy the court that without one he will suffer irreparable harm or, in other words, that his legal remedies are inadequate. *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500 (1959).

In this case, the parties are in agreement that the harm the plaintiffs will suffer (if they do not get an injunction) is economic harm. Further, their damages are capable of reasonably precise calculation: to be specific, those damages would be the extra costs involved in driving to a more distant well to obtain water. Normally, the fact that mere economic injury is threatened is, of itself, sufficient grounds to deny

equitable relief. However, in this case the court is presented with the extraordinary situation in which the plaintiffs have no adequate remedy at law for their damages because, although the plaintiffs can calculate their damages, there is no one from whom to collect those damages after they have been calculated.

Clearly, judicial immunity would shield the California courts at all levels from any liability. For his part, McDougal did no more than to obey an order of those courts on pain of going to jail, and it would be grossly unfair to hold him responsible in damages for obeying that order. The County of Imperial and its supervisors are the only defendants left, and they are protected from liability by California Government Code §818.4, as interpreted by such cases as *O'Hagan v. Board of Zoning Adjustment,* 38 Cal.App.3d 722 (1974). Thus, there is no one to compensate the plaintiffs, and it must follow that they have no remedy at law. Accordingly, the injury they would suffer in the absence of an injunction is irreparable.

Success on the Merits

The power to regulate interstate and foreign commerce is granted exclusively to Congress by the Constitution (Art. I, §8, clause 3). State or local laws that directly interfere with interstate commerce are void, but the state may exercise its police powers in ways that do not "unduly" burden interstate commerce. *Southern Pacific Co. v. State of Arizona.* 325 U.S. 761 (1945).

In *Commonwealth of Pennsylvania v. State of West Virginia,* 262 U.S. 553 (1923), the Court held that a natural gas-producing state could not, by statute, give gas customers within the state a preferred status

over out-of-state customers. And in *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262 (1910), the Court invalidated a state law which had the "character and purpose" of denying the owners of natural gas the right to take it out of the state. The Court said: "no state can by action or inaction *prevent*, unreasonably burden, discriminate against *or directly regulate*, interstate commerce or the right to carry it on." (221 U.S. at 272; emphasis added)

These two cases controlled the result in *City of Altus, Oklahoma v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966). The City of Altus was challenging a Texas statute which forbade "drilling a well in Texas and transporting the water outside the State," 255 F.Supp. at 830. The court, relying on the natural gas cases, *supra*, found that the prohibition of the interstate shipment of water was unconstitutional.

In this case, the restriction in McDougal's use permit does not seek to regulate *land* use. It seeks solely to regulate *commodity* use—specifically, the transportation of water outside of the county. The California Supreme Court expressly found that "the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county." *County of Imperial, supra*, at page 512. The restriction did not attempt to regulate land use, the conduct of a business, traffic in a residential area, or any other such activity. Instead, the restriction is on its face a direct prohibition against interstate commerce in the water. The Commerce Clause will not permit such a direct prohibition any more than it would permit the interference with commerce attempted

by the States of West Virginia, Oklahoma, or Texas in the cases cited above.

The cases cited by the defendants do not deal with the same sort of direct prohibition of commerce. One case, however, deserves further comment. In *Hudson County Water Co. v. McCarter,* 209 U.S. 349 (1908), the Court upheld a New Jersey statute which prohibited the transportation of certain water outside the state. River water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well.

Accordingly, there is a probability that the plaintiffs will succeed on the merits of their contention that the restriction in the use permit is unconstitutional.

The Equities and the Public Interest

In *Yakus, supra,* certain wartime price regulations were under attack. Those regulations and the statute which authorized them provided a means of review, but the plaintiff there chose not to use the means provided. The Court found a compelling public interest in the subject matter of the statute as a whole and in preserving the scheme established for review of the regulations. Such factors are not present in this case, however.

There are no means by which these plaintiffs, in contrast to the plaintiff in *Yakus,* can challenge the restriction in the use permit other than the instant proceeding. The only other possible method of attack would be a political proceeding before the appropriate lawmaking entities of Imperial County, a method which the court in the *Altus* case found to be inadequate.

Further, there is no compelling public interest which will be frustrated if the plaintiffs are granted their injunction. There is no comprehensive use plan or water conservation plan the implementation of which will be blocked by an injunction here. All that is involved is one specific piece of real estate and one specific phrase in one specific use permit. Thus, the compelling public interest which existed in *Yakus* is entirely absent here, and the public impact of an injunction will be minimal.

The court recognizes that commercial use of McDougal's well may be an irritant to others in the neighborhood. However, assessing the nature and intensity of such irritation and balancing it against the injury the plaintiffs are suffering, the court finds that the balance tips towards the plaintiffs.

Conclusion

For the reasons discussed above, the court concludes that the plaintiffs are entitled to a preliminary injunction restraining the supervisors and their agents from enforcing the restriction in the use permit which prohibits sale of water for use outside Imperial County.

The court wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water. As the California Supreme Court noted, there is no reason why the county cannot, if it so desires, employ suitable means of land use control so as to prevent a public nuisance. There are many legitimate regulations which the police power would permit the county to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc. The California

Supreme Court noted that on remand the Superior Court could reach just such issues (19 Cal. 3d at page 513), and nothing in the instant opinion is to be construed to the contrary.

DATED: August 29, 1977.

/s/ Howard B. Turrentine

Howard B. Turrentine, United States District Judge

Preliminary Injunction.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, et al., Plaintiffs, v. County of Imperial et al., Defendants. Civil No. 77-491-T.

This matter was heard on August 8, 1977. For the reasons and upon the conditions set forth in the order granting the plaintiffs' motion for a preliminary injunction entered this date,

IT IS ORDERED that the County of Imperial and its supervisors, and their agents and employees, are enjoined from enforcing that condition in defendant McDougal's use permit which prohibits the sale of water for use outside the County of Imperial.

IT IS FURTHER ORDERED that this preliminary injunction is granted on condition that an undertaking in the sum of $1000.00 be filed to make good such damages, not to exceed said sum, as may be suffered or sustained by any party who is found to be wrongfully enjoined.

IT IS FURTHER ORDERED that this preliminary injunction may be served by any person over the age of eighteen years selected for that purpose by the plaintiff.

DATED: August 29, 1977.

/s/ Howard B. Turrentine
Howard B. Turrentine, United
States District Judge

APPENDIX C.

Opinion.

In the Supreme Court of the State of California.

County of Imperial, Plaintiff and Respondent, v. Donald C. McDougal, Defendant and Appellant. L.A. 30681, (Superior Ct. No. 43353).

[May 25, 1977].

In 1967, Imperial County (county) issued to W. Erle Simpson a use permit to allow commercial sales of water from a well on Simpson's property, which was located in a residential subdivision. The permit contained a limitation that water could be sold for use only within the county. Simpson did not challenge the condition, and he sold only small quantities of water from the well for local use. In 1970, the tract in which Simpson's property was located was zoned for low intensity use, but the zoning allowed the development of natural resources for commercial purposes upon the issuance of a conditional use permit.

Simpson sold the property to defendant Donald C. McDougal in 1972. McDougal, without obtaining a new permit pursuant to the 1970 enactment, proceeded to substantially increase the volume of sales of water from the well, and numerous trucks entered the property for the purpose of transporting the water. He failed to comply with the limitation in the Simpson permit against the sale of water for use outside the county, and much of the water from the well was sold for distribution in Mexico.

The county sought injunctive and declaratory relief, alleging that McDougal was violating the 1970 zoning law by selling water for export and by employing tank trucks to carry large amounts of water from the well, without a conditional use permit. The trial

court found in the county's favor and enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972."[1]

On this appeal from the ensuing judgment, McDougal claims that he is not required to secure a permit pursuant to the 1970 zoning ordinance because under the permit issued to Simpson he has a vested right to increase the volume of sales from the well and to employ tank trucks for hauling the water away, and that the limitation in the permit against sales of water for use outside the county is invalid.

The subdivision in which Simpson's land was located consisted of 16 10-acre parcels which were governed by deed restrictions providing that the lots were to be used for residential purposes. Although the tract had not been comprehensively zoned in 1967 when Simpson applied for his permit, an interim zoning ordinance required a permit for any land uses other than those specifically exempted therein, and county officials notified Simpson that he was required to obtain a permit in order to conduct a commercial water sale business.

Public hearings were held on Simpson's application, initially before the planning commission, and subse-

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[1]A second cause of action alleged that the manner in which McDougal operated his business constituted a public nuisance, and a third asserted that McDougal was violating the county's Groundwater Appropriations Ordinance. The third cause of action was by stipulation of the parties ordered to be separated from the first and second, and to be tried only upon good cause being shown on motion of either party. No trial of this count was held. The trial court made no findings on the second cause of action alleging a nuisance, determining that such findings were unnecessary because of its conclusion that McDougal was violating the county's zoning laws.

quently before a joint meeting of the commission and the board of supervisors. At the commission meeting, two other landowners in the tract argued against the granting of the permit on the ground that it would interfere with the quiet enjoyment of their property, and the county's chief planning officer recommended against granting the permit for the same reason.

Between 1968 and 1972, only a few tank trucks were loaded with water from the well, and Simpson sold a total of approximately 500,000 gallons of water in those years. When McDougal purchased the property in 1972, he was aware of the restriction against the sale of water for export from the county and knew that Simpson had not made intensive commercial use of the well. McDougal requested the board of supervisors to remove the export limitation, but he was advised that a conditional use permit would be required to accomplish this result. Without applying for such a permit, he entered into contracts to sell water for distribution in Mexico, and beginning in July 1972 as many as 44 trucks a day, with a capacity of 250,000 gallons, loaded water at the well day and night.

The neighboring landowners protested the noise and fumes generated by the traffic, and county officials, contending that McDougal was required to secure a conditional use permit under the 1970 ordinance, demanded that he discontinue his operation. Thereafter, McDougal applied for a permit, but with insistence that his application was without prejudice to any subsequent claim that no permit was required. The permit was denied, and he unsuccessfully appealed the denial to the board of supervisors.

In October 1972, the county brought this action to restrain McDougal from selling water from the well or from allowing tank trucks to enter his property for the purpose of carrying water away, and it also sought a declaration that McDougal was violating the 1970 zoning ordinance.

The trial court found that McDougal's business "as conducted on the premises commencing on or about June 30, 1972" was in violation of the zoning ordinance because he had failed to secure a conditional use permit. It found further that the Simpson permit did not entitle McDougal "to conduct his type of operation" and that the restriction contained in that permit was designed to prevent the intensive commercial operation undertaken by McDougal because it would be incompatible with the surrounding residential land uses. Finally, the court determined that McDougal's business constituted an illegal "formidable expansion" of the usage contemplated under the Simpson permit, and that any effect on international commerce due to the restriction was merely incidental to a valid exercise of the police power designed to regulate local land use.

The court's judgment declaring that McDougal was in violation of the 1970 ordinance and enjoining him from "conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972" appears to relate both to the sale of water for export outside the county and to the use of substantial numbers of trucks to carry the water from the property. We conclude that the judgment must be upheld in its first aspect but that there was insufficient evidence to justify the prohibition against the manner in which the business was operated.

McDougal's fundamental assertion is that he was not required to obtain the conditional use permit required by the 1970 zoning ordinance because he had a vested right, pursuant to the Simpson permit, to sell water from the well, and that he was not compelled to comply with the geographic restriction in the permit because it is invalid.

Initially, we observe that a conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required.[2] (3 Anderson, American Law of Zoning (2d ed. 1977) p. 359.) Such permits run with the land (Cohn v. County Board of Supervisors (1955) 135 Cal.App.2d 180, 184), and McDougal succeeded to any benefits which Simpson enjoyed under the permit issued to him. Thus, if Simpson would have been allowed to carry on his business in the manner McDougal employed after June 1972, then McDougal was operating within the permit and was not required to secure a permit under the 1970 ordinance.

It is equally clear, however, that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed. Simpson, by failing to challenge the limitations imposed upon him by the permit, waived his right to object to the condition prohibiting the

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[2]Section 83421 of the county's ordinances authorized the issuance of a conditional use permit if "such uses as deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the comprehensive general plan."

sale of water for use outside the county. At the joint meeting between the planning commission and the board of supervisors during which issuance of the permit was discussed, he was represented by counsel, and at that hearing voluntarily withdrew from his application a request to export water to Mexico. The deputy county counsel had stated as his opinion that the proposed limitation on the export of water was valid. Thereafter, Simpson accepted the benefits afforded by the permit and conducted himself in accordance therewith.

A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 650; Zweifel Manufacturing Corp. v. City of Peoria (Ill. 1957) 144 N.E.2d 593, 595; Psyhogios v. Village of Skokie (Ill. App. 1972) 280 N.E.2d 552, 556; Skipjack Cove Marina, Inc. v. County Commissioners (Md. 1969) 250 A.2d 260, 265-267; Stevenson v. Palmer (Tenn. 1969) 448 S.W.2d 67, 69; cf. Naper Aero Club v. County of Du Page (Ill. 1964) 197 N.E.2d 1.) Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, and he is bound by the limitation.[3]

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[3]In view of this conclusion, we need not decide whether the prohibition against the export of water was valid. (See City of Altus, Oklahoma v. Carr (W.D.Tex. 1966) 255 F.Supp. 828.) Shelley v. Kraemer (1947) 334 U.S. 1, relied upon by McDougal, is inapposite. In that case, it was held that the enforcement by a state court of a racially restrictive

We come, then, to the second aspect of the trial court's determination, i.e., that the conditional use permit issued to Simpson did not authorize McDougal to conduct his water sale business as an intensive commercial operation, with numerous trucks entering and leaving the premises night and day. As we have seen, the permit contained no express limitation in this regard. The trial court's determination was based upon its conclusion that the purpose of the restriction against the sale of water for export was to prevent intensive commercial exploitation of the well on Simpson's property in a manner incompatible with the surrounding residential area. McDougal claims that the evidence was insufficient to support this determination, and we agree.

The record establishes that in July 1967 two neighbors opposed Simpson's application for a permit before the planning commission on the ground that commercial use of the property would violate their right of quiet enjoyment, and the county's chief planning officer recommended against granting the permit for the same reason. He testified that the commission was concerned both about the export of water and "intensification of usage of the land" in considering Simpson's application, but did not refer to any specific evidence in this regard. The planning commission determined to hold the matter over for a joint meeting with the board of supervisors in order to allow time for the

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covenant in a real estate contract constituted state action, denying the black purchasers equal protection of the laws. *Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate.

two bodies to formulate a water exportation policy for the county. That hearing was held in September, and members of both bodies expressed concern over the amount of water being exported from the county to Mexico. After Simpson agreed to remove his request to sell water for use in Mexico, the planning commission reconvened and voted to grant the Simpson permit on the condition that water from the well would be sold only for use within the county. No mention was made at the joint meeting of matters relating to the use of Simpson's land, and in the resolution of the planning commission granting the permit reference was made to problems of water export but none to limiting the character of the commercial usage of Simpson's property.[4]

The evidence relied upon by the county is insufficient to sustain the trial court's finding that the restriction was designed to prevent intensive commercial use of Simpson's property. If the commercial character of the proposed use had been a major concern of the commission it was not without means to control Simpson's business by the imposition of appropriate restrictions. Instead, the commission, after extensive discussion of the water exportation problem, issued the permit conditioned only upon a limitation on the export of water, in a resolution which referred only to that issue. Under

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[4]McDougal asserts that the trial court erred in finding that there was public opposition to the granting of the Simpson permit because the resolution of the planning commission granting the permit states otherwise. The resolution, dated September 11, 1967, refers to the joint meeting between the board of supervisors and the planning commission and states that "there was no opposition present at *this* meeting." (Emphasis supplied.) Obviously, the resolution refers to the September meeting rather than the July hearing before the planning commission alone. It is clear from the testimony there was opposition to the granting of Simpson's permit at the July hearing.

these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county.

Thus, the trial court's judgment must be affirmed insofar as it prohibits McDougal from violating the restriction against the exportation of water from the county, and reversed to the extent that it determines that McDougal violated the 1970 zoning ordinance by allowing large numbers of trucks to haul water from the well and enjoins him from operating his business in this manner.

Our decision does not mean, of course, that the county may not employ means to assure that McDougal does not conduct his business by methods which crease a nuisance. As we have seen, the second cause of action in the county's complaint alleged a nuisance, but the trial court found it unnecessary to make findings on this issue because it determined that McDougal's conduct violated the zoning ordinance. Upon remand, the trial court may consider appropriate findings on the county's allegations that McDougal's operation of his business constitutes a nuisance.

One final matter should be noted. The county contended at the trial that McDougal was prohibited from selling water from his well by section 83400 of the county's ordinances, which provides that nonconforming uses of land must be discontinued within one year. The trial court found that "[A]ny nonconforming use right" of McDougal was terminated by this provision. We have concluded that McDougal had a valid conditional use permit for commercial operation of the well, and the operation of his business did not constitute a nonconforming use.

The trial court's judgment is affirmed insofar as it prohibits McDougal from selling water for use outside the county; it is reversed to the extent that it enjoins McDougal from employing large numbers of tank trucks to haul water from his property and determines that such conduct violates the county's 1970 zoning ordinance.

Mosk, *J.*

We concur:

Tobriner, *Acting C. J.*

Clark, *J.*

Richardson, *J.*

*Sullivan, *J.*

**Devine, *J.*

**Brown (Geo. A.), *J.*

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

**Assigned by the Chairman of the Judicial Council.

Order Denying Petition for Rehearing.

In the Supreme Court of the State of California.

County of Imperial, Plaintiff and Respondent, v. Donald C. McDougal, Defendant and Appellant. L.A. 30681, (Super. Ct. No. 43353).

[July 7, 1977]

BY THE COURT

On petition for rehearing, McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court. (Employers' L.A. Corp. v. Indus. Acc. Com. (1918) 177 Cal. 767, 771; Prince v. Hill (1915) 170 Cal. 192, 195; People ex rel. Dept. of Public Works v. Mascotti (1962) 206 Cal. App.2d 772, 779; Bradley v. Bradley (1949) 94 Cal. App.2d 310, 312.)

The petition for rehearing is denied.

APPENDIX D.

Contempt Judgment.

In the Superior Court of the State of California, in and for the County of Imperial.

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant. No. 43353.

Filed, March 6, 1979.

Defendant Donald C. McDougal was, on May 1, 1978, ordered to show cause why he should not be adjudged guilty of contempt for disobeying the Judgment of this Court, entered on July 11, 1973, at Book 127, Page 936 of the Records of the Court, insofar as said judgment prohibits McDougal from selling water from the well on his premises at the Yuha Estates for use outside the County. Hearings on said matter were continued from time to time and concluded on February 28, 1979 at the Courthouse in El Centro, on which date the Defendant was present and represented by Donald C. McDougal, Jr., and David Kay, and, the County was represented by James H. Harmon, County Counsel.

Based on stipulations of Defendant McDougal's Counsel, and on written and oral evidence duly admitted at various hearings, the Court has determined that Defendant McDougal has continued, since September, 1977, to knowingly sell water from the aforesaid premises to persons and/or businesses, who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico. The Court having, on the 28th of February, 1979, announced its intended decision to adjudge McDougal in contempt and, further findings having been waived,

and the stay of execution provided for herein having been agreed to by the parties,

IT IS ORDERED, DECLARED AND DECREED as follows:

1. McDougal is knowingly selling water from the well on the above premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico. Such sale by McDougal constitutes willful disobedience of the Judgment of this Court, as affirmed by the California Supreme Court at 19 C 3d 505 (1977). Defendant McDougal is therefore adjudged guilty of contempt of Court, under Section 1209(5) of the Code of Civil Procedure.

2. McDougal shall cease the selling of water as above described. Execution of this order is, however, stayed until the United States Court of Appeal for the Ninth Circuit renders a decision in the case of *Guillermo Gallego Munoz, et al. v. County of Imperial, et al.* (Appeal No. 77-3293) or until such other time as ordered by this Court, whichever date is sooner.

Dated: March 5, 1979.

/s/ Andrew J. Eyman
Andrew J. Eyman
Judge of the Superior Court

Order Clarifying Stay of Execution Provisions in Contempt Judgment.

In the Superior Court of the State of California, in and for the County of Imperial.

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant. No. 43353.

Filed: March 22, 1979.

GOOD CAUSE APPEARING THEREFORE, the Court hereby modifies and clarifies the stay provisions of its Contempt Judgment, entered in the above captioned case on March 6, 1979, Book 140, page 375, as follows:

Paragraph 2 of page 2, lines 21 through 28, is hereby amended to read:

"2. Defendant McDougal shall cease the selling of water as above described. (Repeated from the aforesaid judgment, page 2.) This order is stayed pending a decision by the United States Court of Appeals for the Ninth Circuit in the case of *Guillermo Gallego Munoz, et al. v. County of Imperial, et al.* (Appeal No. 77-3293), as hereinafter provided. Should the County prevail in said appeal, the effective date of the above referenced cessation order shall be thirty (30) days from the entry of the decision by the Court of Appeal. Should the said Court of Appeals rule adversely to the County's position, and should the County appeal, the stay will continue until final determination of said appeal.

The Court reserves jurisdiction to otherwise modify the stay provisions herein, and/or to impose sanctions, on motion of either party.

The date of entry of the above referenced Contempt Judgment shall be deemed the date of entry of this order clarifying the stay of execution provisions thereof."

IT IS SO ORDERED.

DATED this 21st day of March, 1979.

/s/ Andrew J. Eyman
Andrew J. Eyman
Judge of the Superior Court

Supreme Court, U. S.
FILED
MAY 9 1980
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1003

County of Imperial, California, and the Superior Court of California In and For the County of Imperial,

Petitioners,

vs.

Guillermo Gallego Munoz, Humberto Martinez, Juan de Leon,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

Petition for Certiorari Filed December 26, 1979
Certiorari Granted February 25, 1980

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*The County of Imperial, California; Superior Court of the State of California in and for the County of Imperial; Supervisors Luis Legaspi, John Kennerson, James Bucher, Tunney Williams and Herman Sperber; County Counsel James Harmon and Sheriff Leonard Speer are collectively referred to as "County".

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

Date	Subject
July 19, 1977	Plaintiffs filed complaint for declaratory relief and injunction and motion for temporary restraining order.
July 22, 1977	The District Court issued an order to show cause re preliminary injunction and set the matter for argument on August 8, 1977.
July 29, 1977	County filed opposition to the motion for preliminary injunction.
August 4, 1977	Plaintiffs filed a response to the County's opposition.
August 8, 1977	The District Court heard arguments on the motion for preliminary injunction and took the matter under submission.
August 25, 1977 ...	Plaintiffs filed a "Notice of Reliance on a Broader Claim".
October 2, 1977 ...	The District Court entered its order granting preliminary injunction and preliminary injunction.
September 12, 1977	County filed a request for clarification of preliminary injunction.
September 12, 1977	County filed notice of appeal.
September 28, 1977	County filed a motion for stay pending appeal.
October 3, 1977 ...	County filed an answer to the complaint.

October 6, 1977 ... Plaintiffs filed a response to the motion for stay pending appeal.

October 11, 1977 .. The Court heard arguments on the motion for stay and took the matter under submission.

October 21, 1977 .. Plaintiffs filed a response to the transmittal on October 20, 1977 of the order by this Court denying Mr. McDougal's application for supersedeas.

November 9, 1977 The District Court issued an order denying the motion for stay pending appeal.

November 9, 1977 Defendant McDougal filed an answer to the complaint.

November 9, 1977 Defendant McDougal filed a notice of the filing of a jurisdictional statement with this Court.

May 1, 1977 ..... Plaintiffs filed a petition for order to show cause re contempt against the County Counsel.

May 26, 1978 ..... Order was received from the Court of Appeals denying County's second motion to expedite the appeal without prejudice to renewal if supported by a statement by the District Court indicating disposition of the appeal prior to trial is desirable.*

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*Such a statement was subsequently issued by the District Court and the Court of Appeals ordered the appeal calendared for September, 1978.

June 7, 1978 ..... County filed a response and opposition to petitions for order to show cause re contempt.

June 28, 1978 ..... County filed a second motion for stay of preliminary injunction pending appeal.

July 7, 1978 ..... Plaintiffs filed points and authorities in opposition to the second motion for stay.

July 7, 1978 ..... Defendant McDougal filed an affidavit.

July 10, 1978 ..... County filed an amendment to the second motion for stay.

July 10, 1978 ..... The District Court heard the second motion for stay and denied the motion.

December 12, 1979 The judgment of the Court of Appeals affirming the District Court was entered.

NOTATION OF MATTERS ALREADY PRINTED AS APPENDICES IN THE PETITION FOR CERTIORARI

The following opinions, judgments and orders have been omitted in printing this appendix because they appear in the following designated appendices to the printed Petition for Certiorari:

APPENDIX

Opinion of the Court of Appeals ..... A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic., Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

Filed July 19, 1977

COMPLAINT AND ACTION FOR DECLARATORY RELIEF; SPECIFIC PERFORMANCE; TO ENJOIN STATE AND LOCAL OFFICIALS AND POLITICAL SUB-DIVISIONS OF THE STATE OF CALIFORNIA AND VARIOUS PRIVATE PARTIES FROM INTERFERING AND DISCRIMINATING AGAINST GOODS AND FOREIGN COMMERCE, TO WIT: SALE AND TRANSPORTATION OF PERSONAL PROPERTY, I.E., CAPTURED WATER FOR USE AS DRINKING WATER BY INHABITANTS AND VISITORS OF THE REPUBLIC OF MEXICO.

FOR DECLARATORY RELIEF AND INJUNCTION ENJOINING STATE AND LOCAL OFFICIALS FROM OPERATING UNDER STATE LAW, IN A FIELD WHICH HAS BEEN OCCUPIED BY CONGRESS PURSUANT TO ARTICLE ONE, SECTION 8 OF THE UNITED STATES CONSTITUTION (COMMERCE CLAUSE).

FOR DECLARATORY RELIEF AND INJUNCTION ENJOINING STATE AND LOCAL OFFICIALS AND PRIVATE PARTIES FROM DISCRIMINATING UNDER COLOR OF STATE LAW AGAINST PERSONS WHO ARE FOREIGN NATIONALS OR APPEAR TO BE SUCH AND WHO ARE LEGALLY DOING BUSINESS WITHIN THE CONFINES OF THE UNITED STATES OF AMERICA (42 U.S. Code 1981).

FIRST CAUSE OF ACTION

I.

This action arises under the Commerce Clause of the Constitution of the United States, Article One, Section Eight Clause Three. The matter in controversy exceeds, exclusive of interest, and costs, the sum of Ten Thousand Dollars ($10,000.00).

II.

This Court has jurisdiction by virtue of the provisions of 28, United States Code, Sections 1331 and 1332.

III.

The Plaintiffs are now and at all times mentioned herein were as follows:

A. Plaintiff GUILLERMO GALLEGO MUNOZ, whose business address is Avenida Reforma 557, Mexicali, is a

citizen and subject of the sovereign state of the Republic of Mexico, a foreign state.

B. HUMBERTO MARTINEZ, whose business address is Calle J y Gabriel, Mancera, Mexicali, is a citizen and subject of the sovereign state of the Republic of Mexico and is doing business as Planta de Auga Crestal.

C. LIC. JUAN de LEON whose business address is Calle I y Francisco Mujeca 1701, Col. Nacozari, Baja California del Norte, is a citizen and subject of the sovereign state of the Republic of Mexico, and is doing business as Planta de Agua Nacozari.

IV.

The defendants are and at all times mentioned herein were:

A. The defendant, COUNTY OF IMPERIAL is an incorporated political sub-division of the State of California.

B. The SUPERIOR COURT OF THE STATE OF CALIFORNIA is the highest trial tribunal in the State of California and operates pursuant to the laws of said state.

C. Defendant, JAMES HARMON, is the County Counsel and Chief Attorney for enforcement of civil laws for the County of Imperial and is a resident of the County of Imperial, State of California.

D. LUIS LEGASPI is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of the County of Imperial, State of California.

E. JOHN KENNERSON is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of the County of Imperial, State of California.

F. JAMES BUCHER is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of the County of Imperial, State of California.

G. TUNNEY WILLIAMS is a resident of the County of Imperial, State of California, and is a member of the Board of Supervisors of said County of Imperial.

H. HERMAN M. SPERBER is a resident of the County of Imperial, State of California, and is a member of said Board of Supervisors of the County of Imperial.

I. JOHN LEONARD SPEER is a resident of the County of Imperial, State of California, and is the Sheriff of the County of Imperial and as such, is the officer who enforces orders of the Superior Court of the State of California in and for the County of Imperial.

J. Defendant, DONALD COURTNEY McDOUGAL, SR. is a resident of the County of San Diego, State of California, and is doing business in the County of Imperial as McDougal Wells.

V.

Defendant McDOUGAL owns and operates a water well located in the County of Imperial and is known as McDougal Wells, more particularly described as Lot 11 of Yuha Estates, County of Imperial, State of California; defendant McDOUGAL, offers for sale to members of the general public water which has been drawn from his well and stored in a 10,000 gallon commercial storage tank upon said lot in Yuha Estates.

VI.

Plaintiffs are and at all times herein mentioned were engaged in the business of purchasing and transporting the commodity of water by motor vehicle in foreign commerce between the United States of America and the sovereign state and republic of Mexico; plaintiffs are and at all times mentioned herein were authorized to transport water between the State of California and the Republic of Mexico by special permits issued by the State of California Department of Motor Vehicles, by vehicular licenses issued by the State of Baja California del Norte, a political subdivision of the Republic of Mexico, and by virtue of the provisions of and in accordance with the Trade Act of 1974, 19 USC 2101, et seq.

VII.

The water which defendant McDOUGAL has for sale at McDougal Wells was captured water from an underground water basin and is held in storage by him in a 10,000 gallon storage tank located upon his property; defendant DONALD COURTNEY McDOUGAL, SR. did advertise water for sale to the general public with the exception that water would not be sold to Mexican Nationals and other nonresidents of the County of Imperial unless they could prove that the water sold would be used only within the County of Imperial.

VIII.

On or about the 15th day of July, 1977, plaintiffs GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, and LIC. JUAN de LEON, as foreign nationals legally

in the United States of America and engaging in the purchase and transportation of water, tendered money to defendant DONALD COURTNEY McDOUGAL, SR. for the purchase of water at his commercial water well known as McDougal Wells; defendant DONALD COURTNEY McDOUGAL, SR. refused to sell to plaintiffs listed herein water from said well on the grounds that said water would, in his opinion, most likely be used outside of the County of Imperial, to wit said water would, in his opinion, become a part of foreign commerce for resale and use in the sovereign state and Republic of Mexico; defendant McDOUGAL advised all plaintiffs that he would sell water to them for whatever use they pleased but for the fact that he was barred from doing so by virtue of the decision of the Supreme Court of the State of California, Case Number LA 30681, Imperial County Superior Case Number 43353, a copy of said opinion in said Supreme Court case is attached hereto and incorporated herein by reference as Exhibit "A".

IX.

Plaintiffs GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, and LIC. JUAN de LEON, attempted to purchase said water from defendant DONALD COURTNEY McDOUGAL, SR. on July 15, 1977 for the express purpose of transporting said water in foreign commerce to the Republic of Mexico, specifically to the town of Mexicali located in the State of Baja California de Norte, for subsequent bottling and sales as potable drinking water; said water when bottled would be sold to inhabitants and visitors within the State of Baja California del Norte.

X.

On or about June of 1972, plaintiff GUILLERMO GALLEGO MUNOZ and defendant DONALD COURTNEY McDOUGAL, SR. entered into an agreement for the sale of water whereby plaintiff GUILLERMO GALLEGO MUNOZ would act as defendant McDOUGAL'S broker for the sale of water in the Republic of Mexico and in return defendant DONALD COURTNEY McDOUGAL, SR. agreed to sell water to persons referred to McDougal Wells by Plaintiff GUILLERMO GALLEGO MUNOZ.

XI.

That between June 1972 and December 19, 1972, defendant DONALD COURTNEY McDOUGAL, SR. engaged in the sale of water to plaintiff GUILLERMO GALLEGO MUNOZ and various clients of said plaintiff pursuant to the agreement between defendant DONALD COURTNEY McDOUGAL, SR. and GUILLERMO GALLEGO MUNOZ.

XII.

On or about December 19, 1972, defendant DONALD COURTNEY McDOUGAL, SR. was enjoined from further water sales for export to the Republic of Mexico by an order of the Superior Court of the State of California in and for the County of Imperial in Superior Court Case Number 43353; a copy of said preliminary injunction is attached hereto and incorporated herein by reference as if fully set forth as Exhibit "B".

XIII.

Defendant DONALD COURTNEY McDOUGAL, SR. has since December 19, 1972 been restrained and required

not to sell water to Mexico or for use in Mexico and since August 1973, has been ordered not to sell water to tank trucks of any type for any purpose irrespective of where said water was to be used pursuant to an order of permanent injunction filed in the same Superior Court Case Number 43353, a copy of said injunction is attached hereto and incorporated herein by reference as if fully set forth as Exhibit "C".

XIV.

The injunction attached hereto and incorporated herein by reference as Exhibit "C" was dissolved by the Supreme Court of the State of California in Case Number LA 30681 attached hereto and incorporated herein by reference as if fully set forth as Exhibit "A" with the exception that the Supreme Court ordered the trial court's judgment affirmed as set forth in Exhibit "C" only insofar as it prohibits McDOUGAL from selling water for use outside of the County of Imperial; the Supreme Court of the State of California reversed the trial court's ruling to the extent that it enjoined McDOUGAL from employing large numbers of tank trucks to haul water from his property and to the extent that it determined that his conduct in the commercial sales of water had not violated the 1970 County Zoning Ordinance of the County of Imperial.

XV.

The original injunction attached hereto as Exhibit "B" restraining defendant McDOUGAL from selling water to Mexican Nationals and plaintiffs herein was sought by the County of Imperial pursuant to orders of the Board of Supervisors of said County; the injunction was carried forth and sought by the County Counsel by the legal officer and attorney for said County, defendant JAMES HARMON and

said injunction is enfored by the Sheriff of the County of Imperial, defendant J. LEONARD SPEER.

XVI.

Defendant McDOUGAL was engaging in foreign commerce with plaintiff GUILLERMO GALLEGO MUNOZ and other Mexican Nationals prior to the County of Imperial seeking the injunction restraining McDOUGAL from engaging in interstate and international commerce.

XVII.

The Supreme Court of the State of California in issuing its decision attached hereto and incorporated herein as Exhibit "A" in affirming the injunction barring the sales of water in interstate and foreign commerce, relied solely upon the alleged fact that defendant McDOUGAL'S predecessor in interest, W. Earl Simpson, originally obtained a Conditional Use Permit for the operation of the commercial water well, and attached to said original Conditional Use Permit was a prohibition barring Mr. Simpson from selling water for use outside the County of Imperial; the Supreme Court of the State of California has ruled that defendant DONALD COURTNEY McDOUGAL, SR. is estopped to assert that such prohibition on the original Conditional Use Permit to which he is the successor in interest was invalid; said Supreme Court has ordered that McDOUGAL was bound to honor the condition of the original Conditional Use Permit and thus, he refused to sell water to plaintiffs herein and any and all other Mexican Nationals or other individuals involved in interstate or foreign commerce; the effective ruling of the Supreme Court of California's decision is that defendant McDOUGAL may only sell water to individuals or persons who will make use of McDOUGAL'S water within the County of Imperial.

XVIII.

The water offered for sale by McDOUGAL is a commodity that has been captured and is the personal property of defendant McDOUGAL.

XIX.

The action by the County of Imperial, the State Supreme Court of California and the Superior Court of the State of California as its enforcement arms, and by the Sheriff of the County of Imperial and the Board of Supervisors and County Counsel of the County of Imperial is in direct contradiction to and is invalid pursuant to Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) which reserves exclusive and plenary power to the Federal Government to control foreign and interstate commerce; water is a commodity once it has been captured and is personal property which is subject to control only by the Federal Government if it is being sold in interstate or foreign commerce.

XX.

The actions of the County of Imperial in enforcing the unconstitutional and invalid prohibition in McDOUGAL'S original Conditional Use Permit is designed to, and does, discriminate in favor of local residents in said community and in the sale of said commodity against foreign and interstate commerce and imposes an unreasonable burden on foreign and interstate commerce.

XXI.

The original Conditional Use Permit to which defendant DONALD COURTNEY McDOUGAL, SR. is the successor in interest was issued by the County of Imperial in 1967 to W. Earl Simpson. In the issuing of said original Permit, the County Counsel of the County of Imperial informed the

Board of Supervisors and the Planning Commission that it would not be an interference with the Interstate or Foreign Commerce Clause of the United States Constitution to impose a restriction upon Mr. Simpson as to his sales of water to people outside of the County of Imperial. Defendant's predecessor, Simpson, under the duress of not being granted any permit if he did not agree to the exclusion of interstate and foreign commerce, accepted the permit and did thereby operate his water well pursuant to said permit. Pursuant to the laws of the State of California, defendant DONALD COURTNEY McDOUGAL, SR. became the successor in interest of said Conditional Use Permit as is set out in the Supreme Court of the State of California's opinion attached hereto as Exhibit "A".

XXII.

Upon information and belief plaintiffs herein allege that defendant DONALD COURTNEY McDOUGAL, SR. is desirous of and would sell water in interstate and foreign commerce but for the restraining order and injunction currently precluding him from doing so as well as his fear of criminal prosecution for violation of the zoning laws of the County of Imperial, State of California.

XXIII.

The highest court of the State of California, the California Supreme Court, has failed and refused to determine whether or not the condition precluding sale in interstate and foreign commerce on McDOUGAL'S Conditional Use Permit is violative of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause). At Page Eight of Exhibit "A" the Supreme Court of the State of California has specifically declined to rule on the constitutionality of said Conditional Use Permit provision inasmuch as said Supreme Court has determined that defendant

McDOUGAL is bound by the conduct of his predecessor in interest and is thereby estopped to raise the issue.

XXIV.

That at no time have the plaintiffs herein by either conduct, word or action, impliedly, directly or indirectly waived or in any way given up their rights to engage in foreign commerce or their rights to challenge the constitutionality of local regulations imposing home embargoes precluding the sale of commodities in foreign and interstate commerce.

XXV.

By reason of the conduct of defendants herein through their respect instrumentalities, and by reason of the conduct of defendant DONALD COURTNEY McDOUGAL, SR., an actual controvery exists between plaintiffs and defendants herein relating to the legal rights and duties of the respective parties. More particularly, said controversy raises the following opposing contentions:

A. Plaintiffs contend and defendants deny that the United States Government, by virtue of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) has exclusive and plenary jurisdiction over commodities and personal property as they are used in interstate and foreign commerce.

B. Plaintiffs contend and defendants deny that water captured by defendant McDOUGAL and stored in his water tanks on his property constitute commodities in foreign and interstate commerce and subject to the provisions of said Article One, Section Eight, Clause Three of the United States Constitution.

C. Plaintiffs contend and defendants deny that the actions of the defendants constitutes a direct and unreasonable and discriminatory burden on interstate and foreign commerce

in that it totally prevents interstate and foreign commerce between plaintiffs herein and defendant McDOUGAL and the commodity of captured water which is the personal property of defendant McDOUGAL.

D. Plaintiffs contend and defendants deny that the provisions attached to defendant McDOUGAL'S Conditional Use Permit restraining him from selling water for use outside of the County of Imperial wholly discriminates in favor of local sales of that same commodity and is in fact, a home embargo and violative of the provisions of the Commerce Clause of the United States Constitution.

E. Plaintiffs contend and defendants deny that if such restriction with the Conditional Use Permit applying to defendant McDOUGAL'S property, McDougal Wells, is a valid restriction regulating interstate commerce then it is being applied in an unequal and arbitrary capricious manner so as to unduly burden and interfere with interstate and foreign commerce.

XXVI.

Defendant DONALD COURTNEY McDOUGAL, SR. contends that he is enjoined from selling water to plaintiffs herein due to the decision of the Supreme Court of the State of California attached herein as Exhibit "A"; defendant DONALD COURTNEY McDOUGAL, SR. does presently refuse to sell to all plaintiffs herein his personal property which he holds out for sale to the general public, i.e., bulk water.

XXVII.

The remaining defendants herein contend that defendant DONALD COURTNEY McDOUGAL, SR. may not sell water for use outside of the County of Imperial due to the fact that his predecessor in interest W. Earl Simpson accepted the Conditional Use Permit for commercial water

sales with the condition attached thereto that water could not be sold for use outside of the County of Imperial. Plaintiffs herein appeared before the California Supreme Court in decision number LA 30681 by virtue of an *amicus curiae* brief filed on their behalf; that by virtue of the decision of the California Supreme Court attached hereto as Exhibit "A" any actions brought by plaintiffs in the judicial system of the State of California would be an idle act; that plaintiffs herein have exhausted all of their remedies within the state courts in an attempt to assert their rights to engage in foreign commerce, and that plaintiffs have no claim, speedy, and adequate remedy in the ordinary course of law.

XXVIII.

As a result of the decision of the California Supreme Court and the enforcement of the unconstitutional provision governing defendant McDOUGAL'S sale of water, plaintiffs herein will suffer and sustain irreparable damage in that plaintiffs will be unable to engage in foreign commerce and will be left without an adequate remedy at law inasmuch as compensation could not be sought from McDOUGAL by virtue of the decision of the California Supreme Court. In addition, plaintiffs herein will suffer irreparable damage by virtue of there being a shortage of potable drinking water within the City of Mexicali, Republic of Mexico; that the absence of water over the hot summer months cannot be compensated for by monetary damages.

XXVIII.

The order of the Supreme Court of the State of California enforcing the lower court's order and enjoining McDOUGAL from selling water for use outside of the County of Imperial became final on the 7th day of July 1977, after defendant McDOUGAL filed a petition for rehearing therein, said petition being denied.

XXIX.

Plaintiffs herein are entitled to injunctive relief restraining and enjoining defendants herein from interfering with plaintiffs right and defendant McDOUGAL'S right to engage in interstate and foreign commerce.

XXX.

All plaintiffs herein are entitled to a mandatory injunction against defendant McDOUGAL ordering him not to discriminate against them based upon their national origin or based upon their place of intended ultimate use of the commodity that he has for sale.

SECOND CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

Plaintiff GUILLERMO GALLEGO MUNOZ entered into a contract with defendant DONALD COURTNEY McDOUGAL, SR. in 1972 and presently has a contract with said defendant McDOUGAL for the sale of water from McDOUGAL'S commercial water well to GUILLERMO GALLEGO MUNOZ as a broker for resale in foreign commerce to water companies who are operating as bottling companies within the Republic of Mexico, specifically within the City of Mexicali and all of its jurisdiction. In specific, all other plaintiffs herein other than GUILLERMO GALLEGO MUNOZ are water companies operating as bottling companies within the Republic of Mexico to whom plaintiff GUILLERMO GALLEGO MUNOZ intends to sell water obtained pursuant to his contract with McDOUGAL.

III.

The defendants herein and each of them, with the exception of DONALD COURTNEY McDOUGAL, SR., have interfered with his contractual relationship between plaintiffs and defendant McDOUGAL and defendant McDOUGAL at this time refuses to honor his contractual obligations and sell water to plaintiff GUILLERMO GALLEGO MUNOZ.

IV.

All other plaintiffs named herein are purchasers of water from plaintiff GUILLERMO GALLEGO MUNOZ and have contractual relationships with him to purchase water from him as a broker and have had such contractual relationship interfered with by the defendants herein with the exception of DONALD COURTNEY McDOUGAL, SR.; all other plaintiffs herein are third party beneficiaries of that contract between plaintiff GUILLERMO GALLEGO MUNOZ and defendant DONALD COURTNEY McDOUGAL, SR.

V.

Plaintiff GUILLERMO GALLEGO MUNOZ has complied with and fully and fairly performed each and every term, condition present, and obligation of his contract with DONALD COURTNEY McDOUGAL, SR. and has demanded that defendant McDOUGAL perform fully his obligations pursuant to his agreement.

VI.

Defendant McDOUGAL has refused, and continues to refuse to live up to his obligations pursuant to his agreement with plaintiff GUILLERMO GALLEGO MUNOZ.

VII.

Plaintiff GUILLERMO GALLEGO MUNOZ stands ready, willing and able to pay defendant McDOUGAL all

compensation required in his agreement with McDOUGAL for the purchase of the commodity of water and has in fact, tendered to defendant McDOUGAL contract price for the purchase of the commodity of water.

VIII.

That said property is unique in character in that there is a shortage of potable water within the Republic of Mexico and specifically the City of Mexicali due to the fact that said city's tap water comes directly from the Colorado River and is so filled with salinization and chemicals as to be unfit and unsanitary for human consumption; that due to the hot weather experienced in the summer months in the region where Mexicali is located a shortage of water cannot be compensated for in monetary damages; and, for the reasons heretofore set forth, plaintiff GUILLERMO GALLEGO MUNOZ has no plain, speedy, or adequate remedy in the ordinary course of law, and damages, if awarded, cannot be properly ascertained and will be inadequate to compensate plaintiff for the detriment suffered by him.

THIRD CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

The State of California and its local political subdivisions are operating in a field that has been occupied by the Federal Government pursuant to Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) and thus are violating the United States Constitution.

III.

An actual case in controversy exists between the parties inasmuch as plaintiffs herein contend that defendants are

operating in an area of exclusive and plenary jurisdiction of the Federal Government whereas defendants deny that their conduct violates the Constitution of the United States.

IV.

Plaintiffs herein are entitled to declaratory relief setting forth the rights and obligations of the parties with respect to that certain Conditional Use Permit governing the operation of McDougal Well and a declaration by this Court as to whether or not McDOUGAL may refuse to sell his water into interstate or foreign commerce.

V.

Plaintiffs herein are entitled to an injunction enjoining the State and all of its local political sub-divisions from operating in contravention and in violation of the Commerce Clause of the United States Constitution.

FOURTH CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

On or about July 15, 1977, all plaintiffs mentioned herein approached the well known as McDougal Wells owned by defendant DONALD COURTNEY McDOUGAL, SR. for the purpose of purchasing water from MR. McDOUGAL, as members of the general public; all parties were lawfully within the United States but are citizens of the Republic of Mexico; all plaintiffs herein tendered their offer to pay for water supplied by McDOUGAL but defendant McDOUGAL citing the ruling of the Supreme Court of the State of California and the orders of the County Officials

of the County of Imperial all named as defendants herein, refused to sell to plaintiffs on the grounds that it was his understanding that plaintiffs intended to use the water in foreign commerce and thus, would use the water outside of the County of Imperial in violation of the orders of the courts of the State of California.

III.

Plaintiff LIC. de LEON was tendered an affidaivit [sic] under penalty of perjury for his signature prior to McDOUGAL'S willingness to sell water to plaintiff, a copy of said affidavit is attached hereto and incorporated herein by reference as Exhibit "D".

IV.

Plaintiff LIC. de LEON upon review of said affidavit under penalty of perjury refused to sign said affidavit on the grounds that defendant DONALD COURTNEY McDOUGAL, SR. could not exact such affidavit from him nor could he condition the sale of his water upon its use exclusively within the County of Imperial.

V.

Defendant, DONALD COURTNEY McDOUGAL, SR. based on plaintiff LIC. de LEON'S refusal to execute that certain affidavit a copy of which is attached hereto as Exhibit "D", refused to sell water to plaintiff LIC. de LEON.

VI.

All plaintiffs herein being in the jurisdiction of the United States lawfully and legally have the right to the full legal benefit of all laws of the United States of America to the same extent as any citizen of the United States of America pursuant to Section 1981 of Title 42 of the United States Code. All plaintiffs herein wish to exercise their right to engage in foreign and interstate commerce within the

confines of the United States for the purpose of exporting purchased private property, i.e., the commodity of water, outside of the confines of the United States and to the Republic of Mexico, more specifically the City of Mexicali. This right to engage in foreign commerce is a right guaranteed to all persons within the boundaries of the United States lawfully, by the United States Constitution in instances where the United States Congress has not prescribed the export of water. The denial of plaintiffs' rights herein is an invidious discrimination against plaintiffs in that defendant McDOUGAL is offering for sale a commodity to the general public but is discriminating against plaintiffs because they wish to use the commodity in foreign commerce. This commodity (water) is one which can only be controlled by the United States Congress, as far as interstate or foreign commerce is concerned.

FIFTH CAUSE OF ACTION.

I.

Plaintiffs herein incorporate Paragraphs I through XXIV of the First Cause of Action and reallege them as if set forth in full herein.

II.

The action of the County of Imperial and the courts of the State of California in restraining defendant DONALD COURTNEY McDOUGAL, SR. from selling water to plaintiffs herein constitutes an unequal application of the law and constitutes an arbitrary and unreasonable classification of uses within the County of Imperial.

III.

There is, operating within the County of Imperial, a commercial water well known as the Clifford Well in Ocotillo Wells and the owners of said water well are in no way

restrained or enjoined from selling water in interstate or foreign commerce to plaintiffs herein.

IV.

The Ocotillo Wells water well is eight miles further from the City of Mexicali, plaintiffs' place of business, then the McDougal Wells.

V.

The action of the County of Imperial and the courts of the State of California in forcing plaintiffs herein to drive their water tank trucks an additional sixteen miles per trip is an unreasonable burden on foreign commerce.

VI.

Allowing plaintiffs herein to purchase water from the well at Ocotillo Wells but not from McDougal Wells constitutes an arbitrary and unreasonable classification as to where water may be purchased within the County of Imperial and from whom it may be purchased.

VII.

The actions of the County of Imperial and the courts of the State of California have impliedly and in fact set forth a monopoly and granted a monopoly unlawfully and in contravention of the United States Constitution to the owners of Ocotillo Wells.

VIII.

Defendant DONALD COURTNEY McDOUGAL, SR. sells his water to the general public at a rate of $1.00 per thousand gallons whereas the owners of Ocotillo Wells sell their water to the general public at a rate of $1.40 per thousand gallons.

IX.

That the forcing of plaintiffs herein to purchase water from Ocotillo Wells is so burdensome and onerous as to be

unconstitutional within the provisions of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause).

WHEREFORE, plaintiffs and each of them pray judgment against defendants as follows:

1. For a temporary restraining order and a preliminary junction and permanent injunction restraining and enjoining the County of Imperial, through its attorney, JAMES HARMON, or any of its officers, agents or employees, from moving the Superior Court to bring penal or contempt actions against defendant McDOUGAL or any other persons for selling or purchasing water produced at defendant McDougal's well, which is being used in interstate or foreign commerce.

2. For a temporary restraining order, preliminary injunction and permanent injunction restraining and enjoining the Superior Court and all other parties (except McDougal) from interfering with defendant McDougal selling, or plaintiffs herein purchasing from McDougal, water to be used in foreign commerce.

3. For a temporary restraining order, preliminary injunction and permanent injunction, restraining and enjoining all the defendants and each of them, from restraining or enjoining in any way the purchase by plaintiffs of water from defendant McDougal's well for shipment in foreign commerce to Mexico.

4. For declaratory judgment of the rights, duties and obligations of plaintiffs and defendants herein as follows:

a. That the United States Government, by virtue of Article One, Section Eight, Clause Three of the United States Constitution (Commerce Clause) has exclusive and plenary

jurisdiction over commodities and personal property as they are used in interstate and foreign commerce.

b. That water captured by defendant McDOUGAL and stored in his water tanks, on his property, constitute commodities in foreign and interstate commerce and subject to the provisions or Article One, Section Eight, Clause Three of the United States Constitution.

c. That the actions of defendants constitute a direct and unreasonable and discriminatory burden on interstate and foreign commerce and that it totally prevents interstate and foreign commerce between plaintiffs herein and defendant McDOUGAL and the commodity of captured water which is the personal property of defendant McDOUGAL.

d. That the provisions attached to defendant McDOUGAL conditional use permit, restraining him from selling water for use outside the County of Imperial, discriminates in favor of local sales of that same commodity and is in fact, a home embargo violative of provisions of the Commerce Clause of the United States Constitution.

e. That if such restriction within the conditional use permit applying to defendant McDOUGAL's property, McDougal Wells, is a valid restriction regulating interstate commerce, then it is being applied in an unequal and arbitrary capricious manner so as to unduly burden and interfere with interstate and foreign commerce.

5. For temporary restraining order, permanent injunction and a preliminary injunction, mandatorily ordering defendant McDOUGAL not to discriminate against plaintiffs in the sale of water based upon their national origin or based upon the place or intended ultimate use of the water purchased.

6. For a temporary restraining order and preliminary injunction, restraining defendant IMPERIAL COUNTY, its

agents officers and employees and all persons in active consort with it during the pendency of this action from originating any action or engaging in any conduct which would prohibit or interfere with or restrict defendant McDOUGAL from selling and plaintiffs from purchasing water at defendant McDOUGAL's well.

7. For specific performance by McDOUGAL of that certain contract between plaintiff GUILLERMO GALLEGO MUNOZ and defendant McDOUGAL, as is more fully set forth in the Second Cause of Action.

8. For declaration by this Court of the rights, duties and obligations of the parties under the contract between McDOUGAL and GALLEGO.

9. For declaration by the Court that the condition attached to the McDOUGAL conditional use permit purporting to bar sale of water to plaintiffs is invalid and void as unconstitutional and onerous burden restricting interstate and foreign commerce.

10. For declaration by this Court that the condition attached to defendant McDOUGAL's conditional use permit is arbitrary, capricious and in violation of the equal protection clause and Commerce Clause of the United States Constitution.

11. For declaration by this Court that the condition attached to the McDOUGAL conditional use permit, which purports to bar the sale of water to plaintiffs is unconstitutional as applied.

12. For attorneys fees, according to proof thereof at time of trial.

13. For costs of suit herein.

14. For such other relief as the Court deems just and proper.

Dated: July 18, 1977

/s/ W. H. Kronberger, Jr.
WILLIAM H. KRONBERGER, JR.
MURRY LUFTIG
Attorneys for Plaintiffs

State of California, County of San Diego—ss

GUILLERMO GALLEGO MUNOZ, being first Duly sworn, deposes and says that he resides at 557 Reforma Street, Mexicali, B.C., Mexico, that he is one of the plaintiffs herein; and that he has read the foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ Guillermo Gallego Munoz

(Jurat Omitted)

EXHIBIT "A" TO COMPLAINT

(The above referenced exhibit is a copy of the opinion of the California Supreme Court in County of Imperial v. Donald C. McDougal. It is omitted from this printed appendix but the opinion appears as Appendix "C" to the Petition for Certiorari.)

EXHIBIT "B" TO COMPLAINT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

PRELIMINARY INJUNCTION

Filed December 18, 1972

The application of the plaintiff County of Imperial for preliminary injunction came on regularly to be heard on December 11, 1972, pursuant to an order to show cause issued by the Court on October 11, 1972. The Court on the aforesaid date considered the pleadings, memoranda of points and authorities, supporting declarations and exhibits and the arguments of counsel. Representations having been made that the granting of a preliminary injunction would deprive residents of Baja California of needed drinking water, the Court continued the hearing until this 18th day of December 1972 and directed that investigation be made concerning said issue.

A satisfactory showing having been made that the issuance of preliminary injunction will not deprive Baja California of necessary drinking water and good cause further appearing therefor:

IT IS HEREBY ORDERED that during the pendency of this action defendant, and his agents, employees, representatives and all persons acting in concert or participating with them, shall be and they are hereby enjoined and restrained from utilizing the premises which is the subject of this action for any use not authorized pursuant to the County's Open Space (S) Zone, effective enacted November 5, 1970. This order shall be deemed to enjoin during the pendency of this

action, further natural resource development involving the operation of tank trucks to and from the premises for the purpose of conveying water therefrom to Mexico.

IT IS FURTHER ORDERED that this order shall take effect at 10 o'clock a.m. on December 19, 1972.

Dated: December 18, 1972

/s/ Andrew J. Eyman
Judge of the Superior Court

EXHIBIT "C" TO COMPLAINT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL
Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

FINAL JUDGMENT
Entered July 11, 1973

The above cause came on regularly for trial on April 5, 1973, in Department I of the above entitled Court, the Hon. Andrew J. Eyman, Judge, presiding without a jury, and was actually tried on the 5th and 6th of April 1973. Evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision and the Court having made and caused to be filed its Written Findings of Fact and Conclusions of Law;

IT IS ORDERED, DECLARED, AND DECREED:

1. Defendant's use of Lot 11 of the "Yuha Estates" as conducted commencing on or about June 30, 1972, involving large numbers of tank trucks driven onto and off the premises at all hours for transporting water therefrom, was in violation of the county's zoning.

2. Plaintiff shall have judgment permanently enjoining the defendant, his heirs, successors, assigns, agents, servants, and employees and all persons acting in concert with or for him, from conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972. Any similar commercial operation on

the premises may only be permitted upon the issuance of a conditional use permit or other proper entitlement by the County.

3. Plaintiff shall further be entitled to its costs of suit.

Dated: July 10, 1973

/s/ Andrew J. Eyman
ANDREW J. EYMAN
Judge of the Superior Court

EXHIBIT "D" TO COMPLAINT

DECLARATION AND AFFIDAVIT FORM

I, _____, do declare, swear and affirm:

1. That I am buying water from DONALD C. McDOUGAL at his location of McDOUGAL WELLS, Lot 11, Yuha Estates, County of Imperial State of California, for use only within the County of Imperial.

2. That I shall not transport the water for any use outside the County of Imperial.

3. That any water that I purchase from Mr. McDOUGAL shall be used only in the County of Imperial, and if I am forced to take the receptical within which the water is being stored or held or used, outside the County of Imperial, I shall dispose of the water inside the County of Imperial in a legal manner.

4. That I am / am not a resident of the County of Imperial, and that I realize that my failure to follow this declaration in the use of the water I purchase from Mr. McDOUGAL could subject me to criminal and civil liabilities before the Courts of the State of California.

I declare, under penalty of perjury, that I have read the foregoing and have filled in the blanks therein and have checked the appropriate spots where a decision is to be made on the wording and that I understand the same and will abide by the same.

Executed on _____, 1977 at _____ California.

_____

The above named individual read and signed the above declaration in my presence on , 1977, at .m. at McDOUGAL WELLS, Imperial, California.

WITNESS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

AFFIDAVIT OF GUILLERMO GALLEGO MUNOZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Filed July 19, 1977

State of California, County of Imperial—ss.

GUILLERMO GALLEGO MUNOZ, being duly sworn, deposes and says:

1. He is a Plaintiff in the above-entitled action.
2. That he is a citizen and a resident of the Republic of Mexico, residing in the City of Mexicali, State of Baja California del Norte, Republic of Mexico, and his business address is Ave. Reforma 557, Mexicali.
3. That I have had since June of 1972, a contract, with Donald C. McDougal, to act as a broker for the sale of water to water bottling companies in the City of Mexicali.
4. That Donald C. McDougal performed that contract from June, 1972 through December 19, 1972, until he was restrained from operating his water well, pursuant to a Temporary Restraining Order of the Superior Court

of the State of California in and for the County of Imperial.

5. That during the six (6) months that Mr. McDougal performed under his agreement with me, that I brokered the sale of approximately 250,000 gallons of water per day from Mr. McDougal's well; that the sales price was $1.00 per thousand gallons, and that my agreement with Mr. McDougal called for a 50% spread of the gross proceeds on a daily basis.
6. That pursuant to that contract with Mr. McDougal, gross sales for Mr. McDougal's wells yielded on the average $250.00 per day of which I earned $125.00 per day.
7. That on July 15, 1977, Donald C. McDougal reopened his wells for sale of water to the general public.
8. On July 15, 1977, I took a water truck from Mexicali to Mr. McDougal's wells and sought to purchase water from him at the posted price of $1.00 per thousand gallons.
9. Mr. McDougal, upon my arrival informed me that he would refuse to sell any water to me due to the fact that I was a Mexican National and that he was aware that I would take the water across the United States border into the Republic of Mexico for sale as bottled water in the City of Mexicali; Mr. McDougal explained to me that he was barred from sale of water to me by Order of the Supreme Court of the State of California, and that should he perform under his agreement with me, that he would be open to criminal prosecution under the laws of the County of Imperial and possible contempt citations from the Superior Court of the State of California in and for the County of Imperial.

10. That *the main single source of potable drinking water* for the City of Mexicali is the well known as the Clifford Well, in Octillo Wells, County of Imperial, State of California, that the Clifford Well presently is selling water at the rate of *$1.40 per thousand gallons* or at a price .40 per thousand gallons more than it is being sold for at Mr. McDougal's wells; that as a Mexican National, I am being forced to pay an additional .40 per thousand gallons for water due to my nationality and my intent to carry water across the International Border; that in addition to having to pay an additional .40 per thousand gallons of water, Mr. McDougal's conduct forces me to drive an additional 16 miles for the round trip between Mexicali and the Clifford Well in Ocotillo, Mr. McDougal's well being 8 miles closer to Mexicali.

11. Mr. McDougal's refusal to sell to me due to the fact that I am a Mexican National residing in Mexicali, is a breach of my agreement with him to broker the sales of water; that should Mr. McDougal honor his agreement with me for the brokerage of water, I am presently able to broker 250,000 gallons of water per day to the bottling plants in the City of Mexicali; the sale of 250,000 gallons of water per day, at the rate of 1.00 per thousand, 7 days a week, would yield to me $125.00 per day, or $3,750.00 a month in brokerage commissions.

12. That I do not have a brokerage agreement with the owner and operator of the Clifford well in Ocotillo, and have suffered severe monitary loss due to the restraining order entered in December, 1972 from the Superior Court of the State of California in and for the County of Imperial; that I have lost income from the sale of water in approximately the amount of 250,000

gallons of water per day, or $125.00 per day since December 19, 1972.

13. Unless an order is issued ordering Mr. McDougal to sell water to me at his posted prices, I will suffer irreparable damage in that I will be unable to sue Mr. McDougal for loss of profits under my agreement with him; I have no adequate remedy at law and connot seek compensation from Mr. McDougal for my losses due to the fact that Mr. McDougal is under orders not to sell to me.

14. The Order of the Superior Court entered on December 19, 1972, which did severe damage to my business, ordered Mr. McDougal to cease the sale of water to anyone, including myself, that would be shipped to Mexicali, Mexico; that between December 19, 1972 and July 15, 1977, I suffered the same damages as any potential customer of Mr. McDougal; that since July 15, 1977, I have been singled out to suffer economic damage due simply to the fact that I wish to make use of the water purchased from Mr. McDougal in foreign commerce by taking it to the City of Mexicali.

15. That should I simply purchase water through deceit and not advise him that I intend to resell the water in the Republic of Mexico, that I could be subject to criminal prosecution for violation of the zoning laws of the County of Imperial.

16. The current season in Mexicali is extremely hot and well water supplies for bottled water are insufficient; the main singular source of well water for bottled water for drinking purposes for the City of Mexicali comes from the Clifford well located in Ocotillo, Imperial County; that that wells capacity and limited number of operating hours is insufficient to supply the bottled

drinking water needs of the City of Mexicali, and the opening of an additional well will assist the citizens and residents of the City of Mexicali in weathering the long hot summer.

17. That should an Injunction or Restraining Order not issue in this case, not only will I suffer an economic loss for which I may not seek compensatory damages from the other party to the contract, Mr. McDougal, but the citizens of Mexicali will be deprived of a safe and sanitary water source.

GUILLERMO GALLEGO MUNOZ

(Jurat Omitted.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

AFFIDAVIT OF HUMBERTO MARTINEZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Filed July 19, 1977

State of California County of Imperial—ss.

HUMBERTO MARTINEZ, being duly sworn, deposes and says:

1. He is a Plaintiff in the above-entitled action.
2. I am a citizen of the Republic of Mexico residing in Mexicali, Baja California del Norte, and my business address is Calle J v Gabriel, Mancera, Mexicali.
3. I am presently in the business of bottling bottled water for consumption of people in the Mexicali metropolitan district and am operating under the business name of Planta de Agua Crestal.
4. In the course of my business I purchase water in the United States from wells located in Imperial County and transport that water across the international border at Calexico to Mexicali to my plant at the above-mentioned address for bottling for resale to the citizens and visitors of the Mexicali metropolitan district, thus sup-

plying them with a safe and sanitary source of drinking water.

5. That my current sole source of supply located in the United States is the Clifford well located in Ocotillo, Imperial County, California.
6. That the Clifford well in Ocotillo is approximately 8 miles further from the international border crossing at Calexico, California, then is the McDougal wells located in the open desert in the Yuha Estates area of Imperial County; that the Clifford wells posted price for water is $1.40 per thousand gallons of water whereas the posted price for McDougal wells is $1.00 per thousand gallons.
7. That on July 15, 1977 after contact by a water broker by the name of GUILLERMO GALLEGO MUNOZ, I arrived at the McDougal Well to purchase water for transport to Mexicali; that upon my approach to Mr. McDougal to purchase water, he asked me where I lived; I advised Mr. McDougal that I lived in Mexicali and that I conducted my business in Mexicali; Mr. McDougal then informed me that since I was a Mexican National and that I intended to use the water for use in the Republic of Mexico, he would not sell it to me; Mr. McDougal further advised me that although he wished to sell water to me, he was absolutely barred from doing so by an Order of the Supreme Court of the State of California, which was being enforced by the Superior Court of the State of California in and for the County of Imperial. Mr. McDougal's refusal to sell water to me at the low price of $1.00 per thousand gallons, causes me both economic loss and grief inasmuch as I could pass this substantial 40% savings in raw material costs to the citizens of Mexicali, who

are in dire need of a safe and sanitary drinking water source.

8. If Mr. McDougal would sell water to me at his lower posted price, not only could I sell water to the citizens of Mexicali at a lower price, but in addition I would have more water available for resale inasmuch as McDougal's well is 16 miles closer to the international border crossing which would enable me to run at least one additional load of water per day to my Plant during Mr. McDougal's posted operating hours of 7:00 a.m. to 11:00 p.m., and in addition thereto, Mr. McDougal's well is open 7 days a week as opposed to the 6 day a week schedule of the Clifford Well in Ocotillo, and is open one hour a day additional to the Clifford well in Ocotillo which is open 7:00 a.m. to 10:00 p.m. Monday through Saturday; the hours of operation combined with the closer proximity of the well and lower prices at the McDougal wells make the purchase of water at the McDougal wells desirable from a business standpoint and desirable from a humanitarian standpoint in providing safe and sanitary water to the citizens and visitors of the metropolitan area of Mexicali, and a community where a safe and sanitary water is in extremely short supply.

HUMBERTO MARTINEZ

(Jurat Omitted)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

SUPPLEMENTAL AFFIDAVIT OF HUMBERTO MARTINEZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

State of California County of Imperial—ss.

HUMBERTO MARTINEZ, being duly sworn, deposes and says:

1. He is a plaintiff in the above-entitled action.
2. I am a citizen of the Republic of Mexico residing in Mexicali, Baja California del Norte, and my business address is Calle J y Gabriel, Mancera, Mexicali.
3. I am presently in the business of bottling bottled water for consumption of people in the Mexicali metropolitan district and am operating under the business name of Planta de Agua Crestal.
4. That the price of the water of the Clifford Well is one dollar and forty cents ($1.40) per thousand gallons whereas the price of water at the McDougal Well is one dollar ($1.00) per one-thousand gallons; that the Clifford Well is eight miles farther from my plant then

the McDougal Well and that I expend a minimum of twenty five cents (25¢) per mile in costs of running my trucks.

5. That my trucks average one-hundred and eighty trips per month; that the additional costs of water between the McDougal and Clifford Wells is two dollars ($2.00) per truck times 180 trips is three-hundred and sixty dollars ($360.00) additional costs for water; that the additional mileage costs between the McDougal and Clifford Wells is $4.00 per trip or $4.00 per 180 trips equals $720.00 monthly; that the average additional cost to purchase water at the Clifford Well is $1,080.00 in excess costs.
6. That the Clifford Well is an unreliable source of drinking water within the County of Imperial inasmuch as there are technical problems in operating the well, that the well has shut down for mechanical reasons for a total of 18 days in September of 1976 and subsequent periods of 8 days and 3 days each between September of 1976 and today.
7. Of the total operating days of the Clifford Well, the total down time is approximately 10 percent and in view of the fact that there is a shortage of water in the Mexicali Region, it is unreasonable to rely on the Clifford Well as a single source for water, particularly in view of the proximity of the McDougal Wells.
8. That the Clifford Well on occasion has refused service to me until such time that I have proven that I am a member in good standing with full dues paid of the Union de Planteras Embotelladores de Agua de Gairafon A.C.; that the owners of the Clifford Well have refused to sell water to me on numerous occasions until such time as I have paid dues to said organization; the

dues that I was most recently required to pay this organization was $15,000 pesos and until said sums were paid, the Clifford Wells refused to sell water to me.

9. That there is no requirement at the McDougal Wells that I pay any sums to any organizations in the Republic of Mexico; that the McDougal Wells if allowed to sell water to me have advised me that there would be no such requirements and that there sole price would be $1.00 per thousand gallons.

HUMBERTO MARTINEZ

(Jurat Omitted.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

AFFIDAVIT OF LIC. DE LEON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

State of California County of Imperial—ss.

LIC. de LEON, being duly sworn, deposes and says:

1. I am LIC. de LEON, an attorney at law, practicing in Mexicali, Baja California del Norte, Republic of Mexico.
2. I am a citizen of the Republic of Mexico and am also engaged in the business of purchasing water in the United States and transporting it to Mexico for bottling and sale as bottled water at my plant doing business under the name of Planta De Agua Nacozari, which is located at Calli I Francisco Mujeca 1701, Col. Nacozari, Baja, California, this being a small village south of the Metropolitan City of Mexicali.
3. On July 15, 1977, I drove to McDougal Wells, a commercial waterwell which advertised it was open for sale to the general public.

4. While there I observed a sign in both English and Spanish indicating that water would not be sold to non-residence of the County of Imperial and would not be sold to anyone for use outside the County of Imperial.
5. I approached Mr. McDougal who was at that well location selling water that morning, and asked him to sell me water, he asked me where I resided and I told him that that wasn't really any of his business, I was just a member of the general public and wished to purchase water from him.
6. He then turned to a younger man who I subsequently learned to be his son, an attorney from San Diego, who handed him a sheet of paper and indicated them to me that I would have to read, fill out, and sign that piece of paper and if I would abide by the terms of the piece of paper that I could purchase the water from him; the piece of paper handed to me by Mr. McDougal is attached hereto as an exhibit to my affidavit and I do hereby declare that it is the same piece of paper handed to me by Mr. McDougal and McDougal Wells.
7. I told Mr. McDougal that I would not sign his piece of paper for I simply wished to purchase water from him. He then indicated to me that he would not sell water to me, that I appeared to him to be a Mexican National and I appeared to be attempting to purchase water from him to be put into a tank truck with Baja California plates, which he told me indicated to him that I was intending to transport water for use in Mexico, thus he would not sell it.

LIC. de LEON

(Jurat Omitted.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

SUPPLEMENTAL AFFIDAVIT OF LIC. JUAN DE LEON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

State of California County of Imperial—ss.

LIC. JUAN de LEON, being duly sworn, deposes and says:

1. I am LIC. JUAN de LEON, an attorney at law, practicing in Mexicali, Baja California del Norte, Republic of Mexico.
2. I am a citizen of the Republic of Mexico and am also engaged in the business of purchasing water in the United States and transporting it to Mexico for bottling and sale as bottled water at my plant doing business under the name of Planta De Agua Nacozari, which is located at Calli I Francisco Mujeca 1701, Col. Nacozari, Baja California, this being a small village south of the Metropolitan City of Mexicali.
3. That the price of water at the Clifford Well is one dollar and forty cents ($1.40) per thousand gallons

whereas the price of water at the McDougal Well is one dollar ($1.00) per one thousand gallons; that the Clifford Well is eight miles farther from my plant than the McDougal well and that I expend a minimum of twenty five cents (25¢) per mile in costs of running my trucks.

4. That my trucks average one-hundred and fifty trips per month; that the additional costs of water between the McDougal and Clifford Wells is two dollars ($2.00) per truck times 150 trips was three-hundred dollars additional costs for water; that the additional mileage cost between the McDougal and Clifford Wells is $4.00 per trip or $4.00 times 150 trips equals $600.00 per month; that the average additional cost to purchase water at the Clifford Well $900.00 per month is excess costs.
5. That the Clifford Well is an unreliable source of drinking water within the County of Imperial inasmuch as there are technical problems in operating the well, that the well has shut down for mechanical reasons for a total of 18 days in September of 1976 and subsequent periods of 8 days and 3 days each between September of 1976 and today.
6. Of the total operating days of the Clifford Well, the total down time is approximately 10 percent and *in view of the fact that there is a shortage of water in the Mexicali Region*, it is unreasonable to rely on the Clifford Well as a single source for water, particularly in view of the proximity of the McDougal Wells.
7. That the Clifford Well on occasion has refused service to me until such time that I have proven that I am a member in good standing with full dues paid of the Union De Planteras Embotelladores de Agua de Gair-

afon A.C.; that the owners of the Clifford Well have refused to sell water to me on numerous occasions until such time as I have paid dues to said organization; the dues that I was most recently required to pay to this organization was 15,000 pesos and until said sums were paid, the Clifford Wells refused to sell water to me.

8. That there is no requirement at the McDougal Wells that I pay any sums to any organizations in the Republic of Mexico; that the McDougal Wells if allowed to sell water to me have advised me that there would be no such requirements and that there sole price would be $1.00 per thousand gallons.

LIC. JUAN de LEON

(JURAT OMITTED.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic Juan de Leon; Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Sr., Defendants.

AFFIDAVIT OF WILLIAM H. KRONBERGER, JR., IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 19, 1977

I, WILLIAM H. KRONBERGER, JR., do hereby declare as follows:

1. That I am counsel for plaintiffs in the within action.
2. That McDougal Wells is located approximately 7½ miles south of Interstate 8 on State Highway 98; that the well referred to in the complaint as Clifford Wells is located on the extension of State Highway 98 approximately ½ mile to the north of Interstate 8 on County Highway S-2.
3. That the photograph attached hereto and incorporated herein by reference as Exhibit "A" was taken at my express direction on July 15, 1977 at McDougal Wells; that said photograph affixed hereto as Exhibit "A" is an accurate reproduction of the sign fronting McDougal Wells which is visible from State Highway 98.
4. That the photograph attached hereto and incorporated herein by reference as Exhibit "B" was taken at my

direction on July 15, 1977 and is an accurate photograph of McDougal Wells and the location where water is pumped from.

5. That the photograph attached hereto as Exhibit "C" was taken at my direction on July 15, 1977 and represents a south view taken from McDougal Wells to the nearest residence which is depicted in the middle left-hand corner of said Exhibit "C"; that the individual standing in the right-hand corner of said Exhibit "C" is myself and I am approximately 20 feet from McDougal Wells and the individual who is taking the photograph.

6. That the photograph attached hereto and incorporated herein by reference as Exhibit "D" was taken at my direction on July 15, 1977 at McDougal Wells when my client, HUMBERTO MARTINEZ attempted to purchase water from defendant DONALD C. McDOUGAL, SR. The parties reading from left to right in said photograph are myself, plaintiff HUMBERTO MARTINEZ, the truck driver, plaintiff GUILLERMO GALLEGO MUNOZ in the background, defendant DONALD C. McDOUGAL, SR. in the foreground, and an unidentified child; that when said picture was taken, HUMBERTO MARTINEZ was requesting to purchase water from McDOUGAL who refused to sell water on the grounds that MARTINEZ was going to take the water across the international border for use in Mexicali.

7. That the photograph attached hereto and incorporated herein by reference as Exhibit "E" was taken at my direction on July 15, 1977 at McDougal Wells; the photograph depicts plaintiff LIC. JUAN de LEON in the middle being handed a piece of paper by defendant DONALD C. McDOUGAL, SR.; that the piece of

paper being handed to my client plaintiff LIC. JUAN de LEON is the same piece of paper attached as Exhibit "A" to LIC. JUAN de LEON's affidavit on file herein; that at the time the photograph was being taken LIC. JUAN de LEON had attempted to purchase water from McDOUGAL and was tendered an affidavit by defendant McDOUGAL to sign under penalty of perjury that said water would not be taken outside of the County of Imperial or used in Mexicali; that my client, LIC. JUAN de LEON refused to sign said affidavit and was thereupon refused the opportunity to purchase water from defendant DONALD C. McDOUGAL, SR.

8. That McDougal Wells is located on State Highway 98, the roadway currently being used by my clients to obtain water from the Clifford Wells; that McDougal Wells is approximately 8 miles closer to the place of business of my clients; that the posted price at McDougal Wells on July 15, 1977 was $1.00 per thousand gallons whereas the Clifford Wells were selling water at the price of $1.40 per thousand gallons.

9. The affidavit on file herein from the federal offices of the Secretary of Health for the Republic of Mexico were delivered to me on July 18, 1977; that I have attached a copy of said affidavit letter hereto and incorporate it herein by reference as Exhibit "F"; that the original communication and affidavit signed under penalty of perjury is on file in the instant action; that I caused said letter to be translated from Spanish into English and that the results of that translation are attached hereto and incorporated herein by reference as Exhibit "G".

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of July, 1977, at San Diego, California.

WILLIAM H. KRONBERGER, JR.,
Attorney for Plaintiffs.

EXHIBIT "G" TO AFFIDAVIT OF WILLIAM KRONBERGER, JR.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon; Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

LETTER OF HUGO HERNANDEZ TERAN, ENG., ADDRESSED TO PRESIDING JUDGE OF THE UNITED STATES DISTRICT COURT.

Filed July 19, 1977

[Seal of the Republic of Mexico,
Secretary of Health and Public Assistance]

Re: Mexicali, Baja Calif. July 15, 1977

Presiding Judge of the United States
Federal Court
Southern District of California

That the bottling plants of bottled water in the city of Mexicalli, Baja California, Mexico during the last 30 years have been supplied water from a well located in the area of Ocotillo, California USA.

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*Exhibits "A" through "E" to Mr. Kronberger's Affidavit consist of photographs contained in the Clerk's Transcript on Appeal. Exhibit "G" is a translation of a letter signed by Hugo Hernandez Teran, Eng., attached as Exhibit "F".

Mr. McDougal is the proprietor of a well located 7 miles south of Ocotillo, California USA having a permit for the sale of water but that he has been prohibited from selling water to Mexican citizens, that is to say Mexico.

The advantages that the City of Mexicalli and its bottle plants would have in having two sources of supply by revoking the prohibition against Mr. McDougal would be that they would not be subject to the whims of the owner of the only well authorized to sell water to the bottling plant in Mexico, elevating his prices ever 6 months.

The functioning of Mr. McDougal's well is convenient since on occasions the wells cease to function due to repairs, broken shafts earthquakes, land settlements or landslides.

Because of the aforementioned and on behalf of the citizens of the City of Mexicalli and the good neighbor policy we beseech your honor that Mr. McDougal be permitted the opening of Mr. McDougal's well in order to avoid suffering that will affect our population and the owner of the mentioned well.

This section in charge of food and beverages and medicines, on behalf of the ministry of Health and Welfare respectfully request that your honor consider and study the facts stated in this petition considering that the benefits to be derived from access to the well of Mr.

McDougal would be vast advantages from the health and humanitarian viewpoint and we believe firmly that our citizens would welcome it with great joy and appreciation.

Respectfully,
EQUAL SUFFERAGE—NO REELECTION
REGIONAL DISTRICT DIRECTOR,
B. CFA.

(signed) Hugo Hernandez Teran, Eng.

I declare and verify under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

(signed) Hugo Hernandez Teran, Eng.
dated: July 13, 1977
(Jurat Omitted)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

COUNTY'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

FILED JULY 29, 1977

(The introduction & text of the County's Opposition to Motion for Preliminary Injunction has been omitted from this printed appendix. The exhibits attached to the Opposition are partially printed below.)

EXHIBIT "A" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed July 11, 1973

The above entitled cause came on regularly for trial on April 5, 1973, in Department I of the above entitled Court, the Honorable Andrew J. Eyman, Judge, presiding, without a jury, and was actually tried on the 5th and 6th of April 1973. The plaintiff appeared by James H. Harmon, County Counsel, and defendant appeared by Alex A. Harper and Donald C. McDougal, Jr., his attorneys.

Said cause having been heard, evidence, both oral and documentary introduced and said cause having been submitted for decision, the Court has entered its decision in favor of the plaintiff and against the defendant, now makes the following Findings, of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds that:

I.

The defendant, commencing on or about June 30, 1972, caused numerous tank trucks to be driven onto Lot 11 of Tract 776 and loaded with water from the well located on the premises. The trucks continually arrived, parked at the well, and departed at all hours of the day and night. By the

defendant's admission, 250,000 gallons per day were transported from the premises. The County brought this action in October 1972 to enjoin the operatic as violative of its zoning regulations.

II.

Facts occurring or existing prior to the time the defendant commenced his described operation are as follows:

(1) Tract 776 (The "Yuha Estates") was subdivided in February of 1966. The subdivision consists of sixteen ten-acre lots.

(2) Lots in the subdivision were offered for sale as residential sites. Among those purchasing lots in 1966 were Mr. and Mrs. Samuel Gallagher (Lots 4, 5, and 6) and Mr. and Mrs. Donald Kiefer (Lots 14 and 15).

(3) In March 1967, W. Erle Simpson purchased Lot 11 adjoining lots purchased by the Gallaghers and Kiefers, and installed a pump, storage tank and overhead loading spout. (Lot 1 containing the well and attendant facilities is hereinafter referred to as the "premises.")

(4) In June 1967, Mr. Simpson made application to the County Planning Commission for a use permit which would authorize the commercial sale of water from the premises.

(5) As of 1967, the Yuha Estates area had not been yet comprehensively zoned. An interim ordinance, adopted in 1959 (ordinance 241), required that any land use other than those expressly exempted operate under use permit issued by the Planning Commission. County officials believed that Mr. Simpson's proposed usage was not in an exempted category and would thus require issuance of a use permit.

(6) Notice on Mr. Simpson's application for a use permit was duly given and a public hearing was held before the County Planning Commission. Mr. Simpson appeared in 1967 in support of the application and was represented by

counsel. Testimony was, however, received opposing the application on grounds that the proposed commercial operation would be incompatible with surrounding residential uses.

(7) Mrs. Kiefer testified in 1967 in opposition to the issuance of any permit which would authorize commercial activity on the premises. She personally argued against allowing an intensive operation on the premises such as was occurring some eight miles to the north at Ocotillo where a well owner was selling large quantities of water to distributors who hauled water from the well site to Baja California, Mexico. Mr. and Mrs. Gallagher submitted letters to the Planning Commission in 1967 similarly opposing any substantial commercial operation on the premises.

(8) The Planning Commission on September 12, 1967, issued a permit to Mr. Simpson authorizing the sale of water on the premises subject to the condition that "[t]he water will be sold only for the use within the Imperial County."

(9) After issuance of the permit, Mr. Simpson only very occasionally sold water, and then in small quantities to individuals including Mr. Nolta and Mr. Scott. Witnesses could only recall having observed a truck parked at the well on one or two occasions over a period of several years. Mr. Simpson utilized the premises in a manner not objectionable to his neighbors and complied with the restriction in the permit while he remained owner.

(10) The County, effective on November 5, 1970, formally zoned the premises in the Open Space (S) Zone. The "S" Zone specifically authorizes general agricultural uses and certain other low intensity uses but requires the issuance of a condition use permit before property is used for development of natural resources of commercial purposes.

(11) On or about June 15, 1972, the defendant purchased the premises from Mr. Simpson. The defendant was aware Simpson had never used the premises for intensive commercial purposes and he was aware of the restriction in the 1967 permit.

(12) On June 20, 1972, the defendant appeared before the Board of Supervisors and requested permission to conduct a business from the premises involving the sale of water for distribution in Mexico. He was informed that no such usage would be allowed without issuance of a conditional use permit authorizing the same.

(13) On June 30, 1972, the defendant executed a contract to sell water from the premises to Mexican water distributors notwithstanding the fact that he had made no application for a permit from the County. Soon thereafter he caused the operation already described to commence.

III.

Facts occurring or existing subsequent to the defendant's commencing of his operation are as follows:

(1) The defendant's 24-hour operation created opposition from neighbors and nearby residents. Mr. and Mrs. Kiefer, Gallagher, Wuthrich and Daugherty were among the property owners claiming to be adversely affected by the operation.

[2) County personnel notified the defendant that his operation was not authorized without issuance of a conditional use permit and demanded the operation be halted.

(3) On July 18, 1972, the defendant made application for a conditional use permit, under the provisions of the "S" Zone, to conduct his operation. The defendant's attorney and the county counsel stipulated that the application was made without prejudice to the defendant's right to claim no permit was required.

(4) A public hearing was held on the application by the County Planning Commission on September 12, 1972. Persons residing or owning property near the premises testified that the 24-hour arrival and departure of trucks at the well created noise, dust, fumes, odors and unsightly views interfering with residential usages. The Commission, after considering the evidence presented, denied the defendant's application.

(5) Defendant appealed the Commission's denial and a hearing was set for October 3, 1972 before the Board of Supervisors. At the defendant's request the Board postponed the hearing date to November 7, 1972. The hearing was subsequently continued to November 21, 1972.

(6) On November 21, 1972, defendant received a *de novo* hearing before the Board of Supervisors with the opportunity to present evidence and examine witnesses. Oral testimony and written exhibits were received and considered. Nearby residents and landowners again appeared and strenously opposed the defendant's application on the same grounds which had been raised before the Planning Commission.

(7) The board of Supervisors, based on the evidence presented, voted to deny the appeal, thereby affirming the earlier determination of the Planning Commission. Nevertheless, the defendant continued his operation in defiance of County authorities prompting the prosecution of this lawsuit.

(8) The County's ordinance establishing standards in connection with conditional use permits (Codified Ordinance Section 83421) provides in part that "[c]ertain uses may be permitted in zones . . . [by issuance of a conditional use permit where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements of the general plan."

(9) Codified Ordinance Section 83400, passed in 1960, and in force and effect since enactment, contains provisions in subsection (7) requiring "[e]very nonconforming use of land . . . shall be discontinued within one (1) year. . . ."

IV.

Except as specifically found herein, all of the allegations of the First Cause of Action of the Complaint (as supplemented by the Supplemental First Cause of Action) are true, and none of the allegations of the Answer Thereto is true.

CONCLUSIONS OF LAW

From Its Findings Of Fact The Court Makes The Following Conclusions Of Law:

I.

Defendant's operation, as conducted on the premises commencing on or about June 30, 1972, was in violation of the County's zoning.

II.

Defendant was required to have a conditional use permit under the Open Space (S) Zone for such an operation; and, the operation conducted without such a permit, was manifestly unlawful.

III.

Issuance of the permit in 1967 to W. Erle Simpson would not entitle the defendant, as Simpson's successor, to conduct his type of operation. The restriction imposed in the Simpson permit was designed to prevent the very type of intensive commercial operation on the premises conducted by the defendant.

IV.

A chief reason for imposition of the restrictive condition in the 1967 permit, i.e., that water would only be used in the County, was to prevent an intensive land usage on the

premises which would be incompatible with surrounding residential land uses and to thus protect the general welfare.

V.

The condition imposed in Simpson's 1967 permit was not intended to directly burden or interfere with international commerce. Any effect on international commerce, caused by the 1967 permit restriction or the denial of the defendant's application, would be merely incidental to a valid exercise of police power designed to regulate local land uses in the interest of general welfare.

VI.

Defendant's operation constituted an illegal "formidable expansion" of any usage of the premises contemplated under the permit issued to Mr. Simpson in 1967.

VII.

Any nonconforming use right possessed by the defendant due to the fact of issuance of the 1967 permit to Simpson would further have been terminated within one year after the enactment of the "S" Zone in 1970 by reason of the nonconforming use elimination provision of the County's ordinances.

VIII.

Full and fair hearings were accorded to the defendant by the Planning Commission and Board of Supervisors. Both bodies are presumed to have denied the defendant's application for conditional use permit on the basis of a determination that the issuance thereof would be contrary to the general welfare.

IX.

It is unnecessary to determine whether the defendant's operation was actually a public nuisance, as alleged in the plaintiff's second cause of action, the Court having deter-

mined that the operation was in violation of the County's zoning.

X.

It is unnecessary to litigate the plaintiff's Third Cause of Action, due to stipulation entered between the parties and the court's conclusion that the defendant's operation would violate County zoning.

XI.

The plaintiff is entitled to judgment permanently enjoining the defendant's operation, as conducted on the premises starting on or about June 30, 1972, and declaratory relief holding that such operation was in violation of the County's zoning. Further, the plaintiff shall be entitled to costs of suit.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 5, 1973

ANDREW J. EYMAN
Judge of the Superior Court

EXHIBIT "B" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

Case No. 43353

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant.

DECLARATION OF GUILLERMO GALLEGO MUNOZ ATTACHED TO ANSWER OF DONALD C. McDOUGAL*

Filed December 7, 1972

I, GUILLERMO GALLEGO MUNOZ, declare as follows:

I am a citizen of the Republic of Mexico residing in the City of Mexicali.

On June 30, 1972, I entered into a contract with Mr. Donald C. McDougal for the delivery of water from a well located on Lot 11, Tract 776, Yuha Estates, located within the County of Imperial. I contracted for this water with Mr. McDougal in order to be able to supply the drinking water bottling companies of Mexicali with the water which they direly need. The reason a new source of water supply was needed by the water companies was because the other well located in the Ocotillo area owned by one Mr. Clifford did not satisfy the needs of the people of Mexicali.

The Ocotillo area is the prime water supply for the drinking water of the City of Mexicali and the City of San Felipe. The water that is taken from the wells in the Ocotillo area

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*The text of the Answer of Donald C. McDougal is omitted from this printed Appendix. The declaration of Mr. Munoz printed above was attached as Exhibit "1" to the Answer.

is transported directly to the bottling companies in Mexicali by truck and it is there bottled into 5-gallon bottles. The municipal water supply in Mexicali is undrinkable according to the information and belief I have at this time.

From the information I have available to me, it would appear that without the supply of water from the Ocotillo wells, the City of Mexicali would be unable, with the number of available tank trucks, to procure the needed 250,000 gallons a day of water for the drinking supply of the City of Mexicali.

I attended a County Board of Supervisors meeting concerning this problem in July of this year. At that meeting, different members of the County Board of Supervisors expressed intentions to the people attending that meeting that they did not intend to allow water to be transported into the Republic of Mexico from the County of Imperial. While I was there, a Mr. Dowe, a member of that Board, expressed that he did not feel that the citizens of Mexicali should be allowed to have the water from Imperial Valley since they had not taken any steps to supply water themselves. It was my clear impression from that meeting that the County Board of Supervisors intended to curtail water appropriation to the Republic of Mexico if it was in their power to do so.

I expressed to them at that time that it was absolutely essential that the City of Mexicali and the City of San Felipe receive water from the Ocotillo basin since that was the only available good drinking water within a reasonable distance or where transportation is feasible.

To my knowledge, the Ocotillo basin has supplied the majority of drinking water to Mexicali and San Felipe for the past 20 years, more or less.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at El Centro, California, on November 7, 1972.

GUILLERMO GALLEGO MUNOZ

EXHIBIT "C" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. L.A. 30681

The County of Imperial, Plaintiff and Respondent, vs. Donald C. McDougal, Defendant and Appellant.

PETITION OF GUILLERMO GALLEGO MUNOZ FOR LEAVE TO FILE AMICUS CURIAE BRIEF WITH THE CALIFORNIA SUPREME COURT AND AMICUS CURIAE BRIEF

Filed September 15, 1976

To the Honorable Chief Justice Donald R. Wright: Herein, petitioner respectfully requests permission to file an amicus brief in the above-entitled cause.

I.

The amicus curiae is one Guillermo Gallego Munoz, a citizen of the City of Mexicali, State of Baja Del Norte, Republic of Mexico.

II.

Petitioner is familiar with the questions involved in the herein case and the scope of their presentation, and believes that there is necessity for additional argument on some of the issues as set forth hereinafter.

III.

The respondent County seeks to enjoin the exportation of water to Mexico, clearly in foreign commerce. Appellant has produced a conditional use permit, permitting sale of water from wells in Imperial County, conditioned only against exportation of the water out of Imperial County. The

County contends that the exportation of the water in foreign commerce to Mexico violates the permit's sole condition. Appellant contends that the application of the condition to foreign commerce is an unconstitutional application of that condition, violating the commerce clause of the United States Constitution. The District Court herein held the condition in the permit violated the commerce clause and was unconstitutional, and, thereupon, struck the entire conditional use permit as being inseverable from that condition.

IV.

Amicus Curiae seeks to present further argument upon several of the issues involved, as follows:

1. If the County attempts to apply the condition in the permit in an unconstitutional manner, should the Court invalidate the permit which permits sale of water, or should it merely strike down the unlawful application by the County.

2. If the Courts of California issue decrees and decision enjoining the sale of water in foreign commerce because the conditional use permit contains a condition against exporting water out of the County, do these decrees and decisions themselves become State action violative of the Federal Constitution?

3. Does striking an unlawful condition in a grant of right invalidate the grant of right itself?

4. Is the unlawful condition or the unlawful application thereof, because it violates the United States Commerce clause, so inseverable that the whole must fall thereby permitting the enjoining of the foreign commerce?

V.

Amicus is vitally interested in this matter because he has purchased pure and sweet water from the subject water wells

in Imperial County for use in the City of Mexicali and the City of San Felipe, both of the Republic of Mexico until that foreign commerce was prevented some four years ago by action of the Court below, in these proceedings. Unless this Court overturns this decision, that foreign commerce will be prevented for all time.

VI.

Your petitioner believes that it is necessary to have additional argument on the points specified above, so that the effect of the decrees and decisions herein, as they affect this foreign commerce, may be presented for your decision.

Wherefore, your petitioner prays for an order allowing him to file an Amicus Curiae brief herein and to appear at the argument of this cause as this Court may desire.

Respectfully submitted,
MURRY LUFTIG
Attorney for Guillermo Gallego Munoz.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR HEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the State of California.

Amicus Curiae respectfully requests that this Honorable Court grant a hearing in the within matter under Rule 29(a)(1) California Rules of Court, to secure uniformity of decision and to settle important questions of law.

The Court of Appeal opinion in the case at bar, conflicts with prior Supreme Court and District Court decisions and opens the way to enforcement of invalid and unconstitutional conditions or applications to a grant of right by holding that

grantee must abide by the unconstitutional and invalid condition or lose the grant.

Amicus is especially concerned with the application of this decision as it affects the foreign commerce here involved, but must point out that this decision, if allowed to stand, opens the way to the attachment of unconstitutional clauses to every valuable grant, to which grantee must bow for fear of losing the grant itself.

The injunction granted herein in the Court below some four years ago, has in fact prevented the sale of fresh and pure water from appellant's wells in Imperial County to the neighboring Mexican cities of Mexicali and San Felipe. The District Court admits that the appellant has a conditional use permit and that the permit has a condition in it which, if applied to this foreign commerce with Mexico, is unconstitutional. See pages 6, 7, 8, 9, and 10 of the District Court decision. But, the District Court then held that since this condition is invalid as applied to this foreign commerce that the entire grant of right should be stricken, and being stricken, the Court below was authorized to enter its injunctive orders and decrees under the District Court's holding.

BRIEF STATEMENT OF THE FACTS TO WHICH AMICUS CURIAE PRESENTS HIS ARGUMENT.

The County of Imperial brought action for injunction against appellants' taking of water from his wells in Imperial County and selling the water in foreign commerce in Mexico. Appellant produced a conditional use permit, permitting the sale of the water, conditioned only against sale of the water out of the County, and a resolution stating expressly that the permit was to be conditioned only against sale of the water out of the County. In affirming an injunction imposed by the trial Court, the District Court found the

condition to be repugnant to the commerce clause of the United States Constitution, U.S. Constitution, Article 1, Section 8, Clause 3. See the opinion at page 8. The District Court, however, found that the condition was inseverable and, therefore, held the whole grant of the permit to be void. See the opinion at pages 8, 9 and 10.

It is the contention of Amicus Curiae that this latter interpretation is not only against established law but in fact itself constitutes State action, which is invidious to that same section of the United States Constitution. In other words, the County very clearly expressed its intention to inhibit the out of County export of the water, an unlawful inhibition. The District Court simply removes the offending language and with it, the permit itself, leaving exactly the same burden on foreign commerce but veiling the naked attack on foreign commerce.

ARGUMENT

Appellant has a conditional use permit to take water in commercial quantities and sell the same. There seems to be no argument to the contrary and, clearly, the parties acted as though that was the intention. Appellant's predecessor, acting under that permit, built a commercial well, built commercial storage facilities and sold the water commercially, all without any demurrer by the County of Imperial.

Appellant, however, acted in another fashion because he sold in foreign commerce and thereby came into direct conflict with the sole condition of the permit, that the holder not sell the water for use out of the County.

While the District Court appears to thrust about for the purpose of the permit, that purpose is clear on its face, to permit the taking of the water and sale thereof, despite any area zoning to the contrary. The condition too, is clear on its face, and is also clear on the face of the enabling res-

olution, to prevent the exportation of the water out of the County. The District Court clearly holds the latter unconstitutional as repugnant to the United States Constitution. What then is left? Clearly, a wholly lawful governmental purpose, that which was being exercised without restraining by appellant's predecessor, to permit the taking of the water for commercial sale, and because of the United States Constitution, for sale in foreign commerce as well as in Imperial County.

A conditional use permit is a grant of right and the precedents are clear that where there is a grant of right with an unconstitutional condition, the grant of right is not stricken, merely the unconstitutional condition. If this were not so, it would be possible to attach the unconstitutional condition to the grant of right and if the condition is attached, simply void the grant of right. Those who desire to sell only to caucasians would be delighted with such an easy formula.

In *Cumings v. Hokr,* 31 Cal. 2d 844; 193 P. 2d 742, the vendors attached a caucasians-only condition to the grant of real property. The Supreme Court held that the Court action sustaining such a clause would be State action and thereby violative of the Federal Constitution. The Court did not strike down the grant; it merely struck the unconstitutional condition. It is clear that if the Supreme Court had instead struck the entire grant, the unconstitutional purpose would have been accomplished. It would have been of small comfort to the non-caucasians to find that they were forestalled from real property ownership not because of the unconstitutional clause but because the clause was held to be inseverable from the grant.

In discussing zoning and planning ordinances and laws, the authorities reflect a general rule that a statute may be constitutional in one part and if the invalid part is severable from the rest, the portion which is constitutional may stand

while that which is unconstitutional is stricken out. Thus, the provisions of a zoning law may be so distinct and severable that one might survive constitutional attack even though others may not. 82 Am. Jur. 2d, Zoning and Planning, Section 16, Partial Invalidity, page 410.

In *City of La Mesa v. Tweed & Gambrell Mill,* 146 Cal. App. 2d 762, the Court held that a zoning ordinance may contain an unconstitutional provision but such fact does not render the whole thereof void if the remaining provisions can be separated from the portions which are valid. The Court further held that the invalid part of a statute is not inseverable from the remainder, unless all of the parts are so interdependent that to eliminate the former would destroy the force of the whole statute. Conversely, the Court held, the valid part will be sustained, even though other parts are invalid, if the former can accomplish one or all of the purposes thereof without the latter.

One does not have to search behind the permit and the resolution to find the governmental intent. The intent on its face was to permit commercial taking of the water and its sale and this is what occurred. The resolution, however, clearly intended a policy to prevent the exportation of the water, a purpose unlawful under the United States Constitution as far as foreign commerce is concerned. Using the test of *City of La Mesa v. Tweed, etc.*, supra, the permit will be sustained if the permit accomplishes one or all of the purposes thereof without the latter condition. Clearly, the purpose was to permit commercial taking and sale of the water. When this was occurring within the confines of Imperial County, the permit was clearly accomplishing its purpose. Therefore, under the the *City of La Mesa v. Tweed & Gambrell Mill,* supra, the permit must be sustained.

But Amicus asserts that the treatment afforded by the Supreme Court in *Cumings v. Hokr,* 31 Cal. 2d 848, is

more to the point. If the constitution is to have meaning, the Courts must not strike a grant of right or benefit, whether by deed or ordinance, containing an unconstitutional clause, on an argument of inseverability, otherwise the Courts lend themselves to the unconstitutional conduct by striking the grant or benefit if the unconstitutionality is asserted.

Sale of Water to Needy Foreign Neighbors in Foreign Commerce Is Not a Frowned-Upon Activity.

The sale of pure and sweet water to the people of the neighboring Mexican cities in foreign commerce ought to be favored not inhibited, by the Courts.

There is a substantial showing in the record that this water from the McDougal wells is needed for reasons of health in the neighboring Mexican cities. See exhibit "J" being the declaration of the Chief of Environmental Health of State of Baja California. The record shows that there has been a rise of illness in Mexico of a type often attributable to poor water conditions. The cities involved, San Felipe and Mexicali, are part of that land mass of Mexico which is geographically closer to the United States than the heartland of Mexico. Substantial negotiations have gone on for years between the two governments over the question of the increasing salinity of the water from the Colorado River as it finally reaches Mexico.

A natural commerce, has developed in a manner which ought to be looked upon favorably by the Courts. The commerce is between foreign nations, beyond the scope of local government to inhibit. When the commerce was within the County, local government did not object; when it reached outside the borders to Mexico, local government did object. It is more than significant that Respondent's pleadings in paragraphs one and four of the First Cause of Action, that

plaintiff complains of the fact that McDougal is selling large quantities of water to places outside of the boundaries of Imperial County and that the water is being distributed to Mexico. While the complaint coyly does not mention the conditional use permit, a questionable bit of pleading, the thrust of those allegations are that appellant has violated the terms of the conditional use permit by the exportation of the water out of the County. Otherwise, these allegations would have no place in the pleadings. They are obviously not mere surplusage but demonstrate clearly the intentions of the County to prevent the foreign commerce.

The Preliminary Order shows clearly the intention to inhibit the sale of the water *to Mexico* because it states exactly that:

> "This order shall be deemed to enjoin during the pendency of this action, further natural resources development involving the operation of tank trucks to and from the premises for the purpose of conveying water therefrom to Mexico." (Clerk's Transcript, page 287.)

The words, "to Mexico" were added, with the acquiesence of the County Counsel because the Court recognized that McDougal had a valid conditional use permit to pump water for sale in Imperial County. (Recorder's Transcript 11, page 19, 11.14, page 20 11.8). Thus, it is clear that foreign commerce has been restrained for over four years by an explicit injunction, setting out the foreign commerce and banning it at the behest of local government which had explicitly provided against it in the sole condition set out in the conditional use permit.

The purpose of the local government objection was not uncertain or ambiguous. It required no testimony as to what the Board's intention was, expressed in both its resolution and the permit itself. The resolution states that a joint meet-

ing was held to "consider a water exploration policy," and that the permit be issued subject to the condition that "the water will be sold only for use in Imperial County." (Clerk's Transcript, pages 106 and 107).

The permit is even more explicit:

> "Permission is hereby granted to: sell water from wells located in Yuha Estates, County of Imperial, State of California, subject to the following condition: 1. The water will be sold only for use within the Imperial County." Exhibit "D" at trial.

SUMMARY

Appellant is the holder of a conditional use permit expressly permitting him to "sell water from wells." The resolution authorizing this permit expressly referred to a "water exportation policy, to stop the exportation of water out of Imperial County." The resolution provided a single condition, "the water will be sold only for use within the Imperial County." (Clerk's Transcript, pages 106 and 107.) The permit itself granted "permission to sell water extracted from wells" subject to only one condition, "the water will be sold only for use within the Imperial County." (Exhibit "D"). Appellant's predecessor, acting under that permit, did the work authorized under the permit, constructed the well, constructed the storage facilities and sold the water commmercially, all without any demurrer by the County of Imperial.

The appellant began to sell his water in foreign commerce to Mexico. Respondent County filed suit, alleging that appellant was selling the water outside of Imperial County to Mexico. Injunctive relief was sought and secured and has been in effect for four years enjoining the sale of the water to Mexico. The District Court admits the application of the condition to foreign commerce is unconstitutional, but holds

the entire permit is void as inseverable. But, clearly, there were two express purposes in the permit and its supporting resolution. The first purpose was to "grant permission to sell water from wells." This is a proper governmental purpose, clearly within the government's power to support its grant of right. Under *City of La Mesa v. Tweed & Gambrell Mill*, 146 Cal.App.2d 762, that is a sufficient governmental purpose to stand by itself if the unlawful condition is stricken. The intention to impose a condition which in its application to foreign commerce is unconstitutional is clear and express in both the resolution and the permit. There is no need to go outside the four corners of the instruments to look for a different purpose. The resolution states expressly that the thing they are trying to do, aside from permitting the sale of the water is prevent its exportation out of the County. The permit is just as unambiguous and they are both the best and only proper evidence of that intent. The Supreme Court has clearly shown an intent that unconstitutional conduct will not be sanctioned by the transparent device of locking the unconstitutional condition to the grant so that to attack the unconstitutionality of the condition voids the grant. *Cumings v. Hokr*, 31 Cal. 2d 844.

The Courts of this State should not lend themselves to an attempt to thwart the provisions of the Federal Constitution so as to prevent citizens of a neighboring nation from purchasing pure and fresh water in foreign commerce.

CONCLUSION

Amicus respectfully prays this Court grant appellant's petition for hearing; grant Amicus petition for hearing and reverse the decision below.

Respectfully submitted,

MURRAY LUFTIG

Attorney for

Guillermo Gallego Munoz

EXHIBIT "D" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. L.A. 30681

County of Imperial, Plaintiff and Respondent, vs. Donald C. McDougal, Defendant and Appellant.

RESPONSE OF AMICUS CURIAE GUILLERMO GALLEGO MUNOZ TO AMICUS CURIAE BRIEF OF THE STATE WATER RESOURCES CONTROL BOARD AND THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Filed January 3, 1977

TO: THE HONORABLE DONALD WRIGHT, CHIEF JUSTICE, and the Associate Justices of the Supreme Court of California:

Amicus analogizes to cases involving licenses and would urge this Court to hold that if any condition in a *vested* conditional use permit is held invalid, the conditional use permit must fall or at least go back to the quasi-judicial body for reconsideration.

Thus with one stroke, Amicus urges this Court to issue a decree de-stablizing and making un-vested every single vested conditional use permit in the State of California. It is noted that in *Avco Com. Developers v. South Coast Reg. Com'n.*, (1976) Sup. 132 Cal. Rptr. 386, handed down by this Court only recently, the Court affirmed the distinction between vested and unvested, property rights.

If this Court followed the lead of Amicus, every hospital, oil well, and filling station, among a few examples, would

be subject to having their land holding based upon vested conditional use permits swept away should they or anyone in the course of litigation secure or become subject to a decree invalidating a specified condition upon the permit.

Now to the case at bench.

It is clear that if a quasi-judicial body had the power to attach an unlawful condition to a conditional use permit under such circumstances that a successful challenge to the condition's unlawfulness would revoke the conditional use permit, or make it subject to revocation even after vested rights therein have been obtained, the unlawful condition would become in effect lawful. In other words, the unlawful condition is enforced by other means, not injunctive relief, but by the decree enforcing the revocation.

The State Court thereupon becomes the instrument of unlawfulness by the enforcement of the unlawful condition by other means, by striking out the whole of the conditional use permit, the most drastic remedy of all.

Take an example: An owner of a water well in Imperial County is given a conditional use permit conditioned only that he not sell to anyone of Mexican ancestry. He thereupon erects the structures under the permit and the permit thereupon, under *Avco* and *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, (1948) 85 CA 2d (776) 194 P. 2d 148, becomes vested. It is clearly unconstitutional to forbid the sale of the water to those of Mexican ancestry. On the other hand, as clearly as can be, no one of Mexican ancestry can secure water from that well. Why not? Because under the course advocated by Respondent and Amicus, allowing a Mexican to drink the water would cause an unvesting of the vested conditional use permit. But who would enforce such an unconstitutional and unlawful action? Under the thesis urged by Respondent and Amicus, the Supreme Court of

the State of California would be the enforcing body because this Court and all its lesser State Courts would be called upon to enforce the forfeiture of the vested conditional use permit thereby most effectively preventing the well owner from having any conditional use permit, even after vesting if he dared to sell to a Mexican.

This is not hypothetical. This is the case at bench. Mr. McDougal sold his water to the Amicus Curiae, Guillermo Gallego Munoz, a Mexican. He sold it to him in Imperial County. He did so after the vesting of the permit by the construction of the well and its works by Simpson, the predecessor in title. The offense was selling Mr. Gallego the water, knowing this Mexican was going to sell water to other Mexicans living in nearby communities within the neighboring Country of the Republic of Mexico. How best to prevent Mexicans from drinking this water? Forfeit the vested conditional use permit. Who is to enforce such conduct? The Supreme Court of the State of California and its lessor Courts.

What is going on here is inescapable. See for example the minutes of the Board of Supervisors and Planning Commission of Imperial County of September 11, 1967, Appendix "B" of "Answer to Brief of Amicus Curiae" being also Exhibit "M". Those minutes clearly show that the Imperial County Board of Supervisors attempted, under color of State law to violate the foreign commerce clause and now seek relief in this Court to become the final enforcing agency herein. There is an absolute recitation that "Mr. Sands, attorney for Mr. Simpson, stated that his client has gone over the permit application with him and had agreed to remove the portion stating or indicating any sale of water to Mexico." He requested permission to continue to do so to December 31, 1968. To which the response by the Chairman was, " 'Five minutes would be too much.' "

See also the oral transcript referred to in the "Amicus Curiae Response to the Petition for Hearing filed by Respondent, County of Imperial," page 2, in which the Trial Court explains that he is penning in the words "to Mexico" into the temporary injunction because "he has a conditional use permit as I understand at the present time to use water in Imperial County, and pump whatever gallons he wants to, so long as it is used in Imperial County," whereupon the Court added the words which "enjoined the operation of tank trucks to and from the premises for the purpose of conveying water therefrom *to Mexico*."

It is difficult to believe that the Attorney General was sufficiently apprised of the facts to be aware that in the case at bench the Respondent is seeking the aid of this Court to permit it to discriminate in an unconstitutional manner and it desires to have the Courts revoke the permit of a landowner because he refuses to discriminate against Mexicans.

The organs of the State of California should not casually rush in to support conduct in which discrimination comes in the guise of State action.

As far as the State being charged with duties to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water in this State, perhaps the writer of the brief was not aware that the State of California, Department of Water Resources had, on or about November 1972, reported that:

> "Based on the available information presented in our report we conclude that the ground water extractions have not caused 'destruction or irreparable injury to the quality of such water as would require your Board to file an action in Superior Court to restrict pumping or to impose physical solutions or both." See Clerk's Transcript on Appeal, Volume II, page 458.

The case at bench is determined by the rule set forth in *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal. App. 2d 776; 194 P. 2d 148.

In that case the Court set out the rule at page 783 as follows:

> "It is not, nor could it be claimed to be that a city council exercises unlimited discretion in the matter of revoking permits. A permit having been issued the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. If a permittee has acquired a vested property right under a permit, the permit cannot be revoked." The query then simply becomes this: Is an unconstitutional condition "reasonable" in the terms of the rule set out in *Trans-Oceanic?* To pose the question is to draw an obvious response. If a condition is so infirm that it violates fundamental law, it is, per se, "unreasonable."*

CONCLUSION

County of Imperial seeks a Court decree affirming the forfeiture of a vested conditional use permit because the solo condition forbids sale of water which would be used in Mexico, an admittedly unconstitutional restriction. To enforce the forfeiture is tantamount to State action enforcing

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*While this case has been argued in the Court below on the assumption that the condition is either valid or invalid, it would appear that the condition may be otherwise lawful, or arguably so, with an unconstitutional application. If the holder of the conditional use permit was subject to a condition that he could not sell the water for use in another County of California, for example San Diego County or Riverside County, that condition could arguably be valid. An application of that condition to interstate or foreign commerce is clearly unconstitutional as the District Court determined herein.

the unconstitutional condition by other means, ie., forfeiture of the vested conditional use permit. Query whether the State, through its Courts, can or ought to lend itself to assisting in enforcing an unconstitutional condition designed to discriminate against Mexicans living in adjacent Mexican cities in violation of the Federal Commerce Clause. Query whether the State, acting through its Courts, ought to declare a forfeiture of a vested conditional use permit because an American landowner holding the vested permit refused to discriminate against a Mexican citizen, Guillermo Gallego Munoz by refusing to sell him water because Mr. Gallego intended to resell it in foreign commerce in Mexico?

Respectfully submitted,

MURRY LUFTIG

Attorney for
Guillermo Gallego Munoz
Amicus Curiae in support of
position of Appellant.

EXHIBIT "E" TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. L.A. 30681

County of Imperial, Plaintiff and Respondent, vs. Donald C. McDougal, Defendant and Appellant.

PETITION FOR REHEARING AND STAY/SUPERSEDEAS PENDING REHEARING, OR PENDING RESULTS OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SUPREME COURT

Filed June 9, 1977

TO: THE HONORABLE CHIEF JUSTICE, and the Associate Justices of the Supreme Court of California:

DONALD C. McDOUGAL, the Appellant and Defendant in the above-entitled case, respectfully petitions this Court for a Rehearing to consider the Court's decision filed on May 25, 1977, by reversing said decision in that part which states that Petitioner DONALD C. McDOUGAL is prohibited from selling water for use outside the County of Imperial. Petitioner's grounds for requesting this reversal are set forth below and it is on the basis of the authority cited herein, along with all papers and briefs already on file in this matter. Petitioner further seeks a Stay and Writ of Supersedea pending the Rehearing of this matter by the Court. Petitioner would ask that the Court Stay its judgment insofar as it prohibits Petitioner from selling water for use outside the County of Imperial and to issue a Writ of Supersedeas allowing Petitioner to engage in International and Interstate Commerce pending the Rehearing of this matter by this

Court. If this Court does not see it fit to grant Rehearing, Petitioner still requests this Stay and Writ of Supersedeas pending Petition for Writ of Certiorari to the United States Supreme Court and asks that said Stay and Writ Issue and remain in full force and effect until such time as the United States Supreme Court either accepts the Petition for Writ of Certiorari at which Petitioner would ask that the Stay and Writ of Supersedeas automatically be extended until such time as the United States Supreme Court renders its decision, or if the United States Supreme Court declines to take the case on Certiorari, then at the time of the notice of the declining by the United States Supreme Court, that the Stay and Writ of Supersedeas then automatically expire.

PETITION FOR REHEARING

Petitioner (appellant) seeks a rehearing of that part of the Court's decision affirming the Court below, under Rule 27a of the Rules on Appeal, upon the grounds that there is a substantial error of law in the decision of the Supreme Court set forth in that decision.

The Supreme Court affirmed in part and reversed in part.

In that portion of the opinion in which the Court affirmed, it did so upon the express ground that one who has applied for a conditional use permit or other special permit is estopped or otherwise waives his right to contest the invalidity of that condition. That this waiver or estoppel is binding upon his successor in interest. See the decision at pages 7 and 8.

However, the Court failed to address itself to the distinction between unconstitutional invalidity and other forms of invalidity, except to note that appellant's citation of *Shelley v. Kraemer*, (1947), 334 U.S. 1 (a case arising under the Fourteenth Amendment) was inapposite.

But, in failing to distinguish between unconstitutional conditions and other forms of invalid conditions, the Court failed to take into account a substantial body of law which has carved out this distinction both in the United States Courts and in California.

That body of law first arose because of legislative discrimination against foreign corporations, but later extended to foreign corporations or other persons whose constitutional rights were being interfered with by the attachment of unconstitutional conditions to various special permits. See 5 Witkins Summary of California Law 8th Edition, Unconstitutional Conditions, Theory and Development of Doctrine, Section 409 and Application Outside Field of Foreign Corporations, Section 410.

The doctrine seems first to have been developed in *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], where the Court held that the state could not attach to a permit, granted to a foreign corporation engaged in interstate commerce to come into the state and do business there, a condition which directly or indirectly interfered with interstate commerce and thus was repugnant to the commerce clause of the United States Constitution.

The Court rested its decision upon the ground that in all the cases in which the Court considered the subject of granting by a state to a foreign corporation consent to the transaction of business in the state, it has been uniformly held that no conditions can be imposed by the state which are repugnant to the Constitution and law of the United States. See the opinion at page 36.

The Western Union Telegraph Company had in fact applied for the permit, although it felt it was not required to do so.

In *Terral v. Burke Construction Co.* (1922) 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed 352; see generally 42 Harv. L. Rev. 676; 15 Cal. L. Rev. 316; 16 Cal. L. Rev. 228, the Court considered the very distinction between an unconstitutional invalidity and other forms of invalidity, glossed over by this Court, in which the entity had applied for and accepted the special permit, with its unconstitutional condition and thereafter the Court sought to enforce the invalid condition.

In that case, the appellee, a foreign corporation, applied for and received a license to do business within the state upon the the express condition that it give up its constitutional right to either remove a suit to the Federal Courts or file suit directly in the Federal Courts.

Having in fact both removed a state action and filed an action in Federal Court, the State was proceeding to revoke its charter.

The United States Supreme Court thereupon enunciated the following rule:

> "The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver, of the exercise of its constitutional right to resort to the Federal Courts or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (Emphasis added.)

The Court made it clear that it rested its decisions upon the principle that the state in the exercise of its sovereign power is subject to the limitations of the United States Constitution, including the commerce power and the due process clause.

Thus, the United States Supreme Court put to rest the spectre of waiver of constitutional rights by holding that whether waived in advance or not, the applicant for a special permit could not thereby be deprived of his constitutional rights by including a waiver of his constitutional rights in the permit.

Viewed in this light, City of Altus, *Oklahoma, et al., v. Carr,* (1966) 255 F.Supp. 828, (affirmed by the U.S. Supreme Court without opinion at 385 U.S. 35, noted by the Court in footnote 3) as well as *Shelley v. Kraemer,* (noted by the Court in footnote 3), both become binding precedents.

In *Danskin v. San Diego Unified School District,* (1946) 28 C.2d 536, 545, 171 P. 2d 885, a statute requiring denial of the use of school buildings for meetings of subversive groups was held unconstitutional upon the authority of *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], *supra, Terral v. Burke Construction Co.* (1922) 257 U.S. 529, *supra,* the Court reasoning that the state did not have to make its school buildings available for public meetings but if it did so it could not attach to the privilege conditions depriving members of the public of their constitutional rights.

The United States Supreme Court reiterated its position that there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. That among these rights are engaging in interstate commerce, resort to the Federal Courts in diversity cases, burdening the exercise of the Twenty Fourth Amendment. *Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed. 2d 562, 567, *Cal. Evidence,* 2d Supp., §899A. The Court in Garrity (supra) further stated that:

> "It is said that there was a "waiver." That, however, is a federal question for us to decide. *Union Pac. R.R.*

Co. v. Pub. Service Comm., 248 U.S. 67, 60-70; *Stevens v. Marks*, 383 U.S. 234, 243-244. The Court in *Union Pac. R. R. Co. v. Pub. Service Comm., Supra*, in speaking of a certificate exacted under protest and in violation of the Commerce Clause said:

> 'Where it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary. . .' Id., at 70.

Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.

> 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' '' Ibid.

This is exactly the same case as the case presently before the Court. The County Board of Supervisors of Imperial County, along with its Planning Commission, clearly exacted from appellant's predecessors in interest's ''waiver'' by duress. The minutes of that meeting where exhibit ''M'' at trial, and also attached as Appendix ''B'' on Answer to Amicus Curiae Brief by the County of Imperial.[1]

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[1]The minutes state in part: Chairman Kilgore called the meeting to order and advised those present that the Board of Supervisors and the Planning Commission are meeting in joint session to discuss various items of concern to both.

Chairman Kilgore directed Mr. T. J. Sands, Attorney for Mr. W. Erle Simpson, to come forward and state his reasoning for zoning permit being granted to include water exportation to Mexico. He further stated that since the Board and Commission are now meeting to reach a

Of course in any event *Terral* (*supra*) settles the question of the waiver of their basic constitutional rights, such rights arising under the Commerce Clause, that states cannot exact

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decision in regards to a Water Exportation Policy, that this is the best time to hear the application.

Mr. Sands, Attorney for Mr. Simpson, stated that his client has gone over the permit application with him, and has agreed to remove the portions stating or indicating any sale of water to Mexico; however, he requested that the application be approved to allow the sale of a certain portion of water to Mexico up to 12-31-68 at which time it would cease. He further stated that the amount sold to Mexico would only be equal to the amount now being sold to Mexico by other persons who own wells in the area. He also stated that approximately 9 trucks per day are exporting water to Mexico, and that his client's exportation would certainly not exceed that.....

Chairman Kilgore stated that exactly 21 trucks per day during a seven day period go into Mexico. He further stated that none of the current operations have submitted application to this Board of Supervisors for approval of exporting water into Mexico, and, if granted, were prior to this Board of Supervisors.

Discussion was held on just what the County could do to restrict or prohibit the exportation of water.

John Pattie, Deputy County Counsel, stated that after considerable research, the findings of the County Counsel is that there is no conflict with the Federal Constitution as far as Interstate or International Commerce is concerned, as to how the local agencies control their natural resources.

Supervisor Langley, stated that in short, we have the right to set our own policy.....

Mr. Sands questioned if he would be in favor of a limited period of time, as previously requested, up to 12-31-68.

Chairman Kilgore stated that in regards to a temporary period of time—"Five Minutes", would be too much.

Commissioner Bornt stated that his main purpose in referring the permit application to the Board of Supervisors was to determine a Policy, because of his concern over the amount of water being taken out of this area.

Mr. Sands questioned if the Planning Commission would be opposed to any sale of water to occupants of the Valley.

Commissioner Bornt stated that he was not, and had never indicated such, nor had the members of the Boards, their main concern was the amount of water being exported out of our County.....

Supervisor Langley stated that if at all possible, the exportation of water into Mexico, should be stopped.....

(footnote continued on following page)

a "waiver" of such constitutional rights, whether waived in advance or not.

It is clear, therefore, that the reliance of this Co . . . . . upon the cases involving estoppel to assert the invalidity of t . . . . . conditions imposed a special permit by accepting that permit is . . . . . misplaced where the invalidity, as here, is its repugnance to t . . . . . Commerce Clause of the United States Constitution.

PETITION FOR STAY AND WRIT OF SUPERSEDEAS

Petitioner and Appellant, DONALD C. McDOUGAL, hereby petitions this Court for a Stay of its Order entered on May 25, 1977, which states that Petitioner Appellant is prohibited from selling water for use outside the County of Imperial. Petitioner only asks that the part of the Court decision be stayed and that the balance of the Court's decision which reverses the findings of lower Court remain affirmed and become final.

Along with the Stay of the Court's findings, the Petitioner also asks that this Court issue a Writ of Supersedeas ordering that Petitioner be allowed to engage in Interstate Commerce and International Commerce from his well pending the rehearing by this Court of this matter. The grounds for this Writ are contained in the Petition for Rehearing above. Should this Court not see fit to rehear this case, Petitioner still asks that the Stay and Writ of Supersedeas issue from this Court and that this Stay and Writ of Supersedeas be

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Chairman Kilgore directed Mr. Sands to resubmit the zoning application to the Planning Commission with the understanding of knowing the Board's purpose and intention of adopting, in conjunction with the Planning Commission, a definite Water Exportation Ordinance.

Commissioner Bornt stated that the permit could be granted this morning when the Planning Commission meets, under the Interim Zoning Ordinance, subject to the restriction of the water being sold only within the County of Imperial." [Emphasis added]

effective until such time as the United States Supreme Court has ruled on Petitioner's Petition for Writ of Certiorari. Should the United States Supreme Court see fit to grant Certiorari, Petitioner requests that the Stay and Writ of Supersedeas remain in full force and affect until such time as the United States Supreme Court enters a decision in this case.

Respectfully submitted,

/s/ Donald C. McDougal, Jr.
DONALD C. McDOUGAL JR.

/s/ Alex A. Harper
ALEX A. HARPER

Attorneys for Defendant and Appellant

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

REPORTER'S TRANSCRIPT OF HEARING RE MOTION FOR PRELIMINARY INJUNCTION ON AUGUST 8, 1977

THE COURT: Let's take Number 21.

THE CLERK: Number 21 on calendar, 77-0491, Guillermo Gallego Munoz, et al, v. County of Imperial Superior Court, et al; Order to show cause why temporary restraining order and/or preliminary injunction should not issue.

MR. LUFTIG: Murry Luftig for plaintiff, your Honor.

MR. KRONBERGER: William H. Kronberger, your Honor, for —

THE COURT: Let's proceed, gentlemen, in your argument.

MR. LUFTIG: If your Honor please, in dividing up the chores between Mr. Kronberger and myself, I will argue briefly the matters that concern getting into court and in a stance to secure injunctive relief. M. Kronberger will argue to the merits.

THE COURT: Very well.

MR. LUFTIG: Party jurisdiction: The matter of party jurisdiction does not concern us here because there is clear diversity jurisdiction between plaintiffs who are all aliens

and defendants who are citizens of the United States and residents of California or are local or state agencies.

Subject matter: Jurisdiction: All of the other cases cited by plaintiffs hold that it is for the District Court to enforce rights under the U.S. Commerce Clause. Injunctive relief jurisdiction: Hale vs. Bimco holds that when the litigation in the state court has come to rest without coming to grips with a claimed invidious assault upon the Commerce Clause, a third party offended by the invidious offense against the Commerce Clause may secure injunctive relief in a federal district court.

In addition, while referring to an offending state law, rather than a condition and conditional use permit, such as here, Transportation Co. v. Parkersberg holds that, even if the injunction against the parties does not lie, injunctive relief can be had directly against the offending law itself and its enforcement. Further, there is special injunctive relief in the Civil Rights Act, which now has been held to reach property rights and to reach all of the United States Constitution. See Lynch v. Household Financial Corporation.

Res Judicata: As far as res judicata is concerned, it all runs against defendants by way of collateral estoppel. The State Supreme Court held that McDougal has a valid vested permit to pump unlimited quantities of water from his well and sell it in commercial quantities and have the same transported by use of tank truck. It also held that the County of Imperial has deliberately tried to prevent sale of the water outside the County and in favor of selling it only in the County, and that this had nothing to do with keeping down the amount of commercial activities about the land. These factors have been held in enumerable court cases cited by plaintiffs to result in an invidious assault upon the Commerce Clause. The State Supreme Court, having failed to

reach the invalidity question because of status difficulties concerning McDougal, it is now for the Federal Courts to make that determination. But the factors traditionally used to find such invidious assault, i.e., discrimination against the Commerce Clause, and onerous burden against the Commerce Clause by way of prohibition against the interstate commerce involved are already determined in the State Court and the defendants are collaterally estopped to deny this. Obviously, further, nothing runs against the plaintiffs who are non-parties.

MR. KRONBERGER: If it please the Court, William Kronberger. I would like to commence, your Honor, by stating the law as I understand it to be, it is pretty clear that if a regulation has, as its effect or as its purpose, a discrimination against interstate or foreign commerce, it is invalid as violative of the Commerce Clause. The County of Imperial's regulation in the instant case not only has as its purpose, but as its clear effect, the absolute ban on both foreign and interstate commerce in water captured and stored on McDougal's property. The defendant's attempts to justify its condition on grounds that it is a valid police power regulation involving land use to prevent intensive trucking operations fly squarely in the face of the decision of the California Supreme Court, which found explicitly to the contrary. Parties defendant herein are collaterally estopped to relitigate the intent and purpose of the condition which does exactly what it says on its face. It is there simply to bar the sale of water outside of the County of Imperial—no other purpose. It is incredible as a sidelight to even maintain that that particular condition should have anything to do with land use.

First of all, the Court is familiar with the area involved. It is difficult to see how there could be any land use difficulties in the middle of nowhere where water is being

pumped. If you can't pump water there, your Honor, I would submit that there are very few places in the County of Imperial that it could be pumped.

Secondly, there is a police power question. If it is there, it must be tested by whether or not the regulation is designed to accomplish the stated purpose. In this case, it clearly can not be designed to accomplish any purpose other than the prohibition of the sale of water outside of the County. For if it were designed to limit trucking operations or commercial intensive use, you would simply limit the number of trucks, limit the hours of operation, or exclude trucks—period. If it was a conservation question — too much water being taken, we would limit the amount of water. That is why the California Supreme Court made its finding. Clearly, it is there for no reason other than to prevent the sale of water outside the County of Imperial. If the County of Imperial had any legitimate interests to protect at all, it could have protected those interests without discriminating against foreign and interstate commerce because the County of Imperial should have no right to decide whether people from Arizona or Mexico buy the ultimate product.

We would submit to the Court, the City of Altus, Oklahoma v. Carr is absolutely and clearly dispositive of the case at bar. I can not imagine a case more on four squares than the one here today. The similarities are striking. First of all, both cases involve residents of states other than the ones making the regulations.

Secondly, both, also in the instant case, involve a flat clear prohibition on the export of water from the state involved.

Finally, both involve the same far-reaching Constitutional principle of a home embargo. If the regulations here can stand, may Pennsylvania keep its coal; the Northwest, its timber; Montana and Wyoming, their minerals; Alaska, its

oil; North Dakota, its wheat? The fact that the regulation that is before the Court today is disguised as a conditional use permit should not alter the results whatsoever. A state or county can not do indirectly that which it can not accomplish directly.

For example, could the City of San Diego, when granting a conditional use permit to operate the tuna factory at Van Camps, attach a condition to "regulate odor and trucking uses at Van Camps"? Let's say, in order to accomplish that purpose, tuna may not be sold outside the City of San Diego? Clearly, it could not. That is what we have here. There is no difference between tuna and water other than in the physical sense, but the Constitutional principle, it remains the same. The Commerce Clause is there to prevent the type of home embargo imposed by the County of Imperial.

In addition, your Honor, we would point out to the Court that the constitutional condition is an unconstitutional one which can not be waived by any of the parties to the instant litigation. The Doctrine of Unconstitutional Conditions provides quite clearly — and we have cited extensively in our initial memorandum — that you can not attach a condition that is unconstitutional to trade one constitutional right for another constitutional right. The Constitution is not subject to trading back and forth.

Finally, your Honor, turning to the evidence before the Court on the need for the preliminary injunction, we point out that there have been no counter affidavits filed to date, that the pleadings on file to verify the complaint and the affidavits of Mr. Munoz, Martinez, and Mr. de Leon are uncontradicted in the record. Clearly, the regulation discriminates absolutely against foreign and interstate commerce. Clearly, the regulation forbids that commerce. And clearly, it has an imminent and irreparable effect upon the plaintiffs in the instant action.

First of all, in reviewing the preliminary injunction, if the chances or likelihood for success are great, the preliminary injunction ought to be granted.

We would point to the Court that we have previously explained in our Points and Authorities and this morning that the likelihood of success on the merits is great. And for that reason, to prevent the trammeling of the Constitution, the preliminary injunction ought to be granted.

Secondly, with respect to the irreparable nature of the harm involved, the nature of the injury to Mr. Munoz, to Mr. Martinez, and Mr. de Leon is such that Mr. Munoz will be clearly and toally out of business if there is no preliminary injunction.

The affidavits of Mr. de Leon and Mr. Martinez demonstrate quite vividly and clearly the massive economic effect of the interstate and foreign commerce regulation imposed by the County of Imperial.

Finally, if the Court decides that it is necessary to weigh the equities to find where the hardship lies, what hardship can there possibly be on the County of Imperial from the granting of the instant preliminary order? The only thing on the County's side is that same amount of water would be pumped from the basins and sold for use across the border in the Republic of Mexico.

On the plaintiff's side, Munoz is totally out of business. Martinez and de Leon conduct their business at higher costs; one, the actual cost of water, and two, in terms of maintenance on their trucks and costs by virtue of having to travel an additional sixteen miles per trip.

Finally, your Honor, in conclusion, we would state two things: One, the instant regulation is clearly violative of the United States Constitution and the Commerce Clause for the reasons stated. Secondly, that the equities, the likelihood

of success and irreparable nature of the harm clearly dictate that the preliminary injunction be ordered in this case.

Thank you for the time of the Court.

THE COURT: Counsel, you accept the position that the County of Imperial has a right to zone this property?

MR. KRONBERGER: Of course, your Honor.

THE COURT: Then, if you accept that proposition, they have the right then to prohibit the sale of any water.

MR. KRONBERGER: Well, your Honor, I would suggest that the question is not, could they have zoned at the time to prohibit the sale of water, or could they do it today? The questions is, at the time that the property was orginally zoned, did they grant the conditional use permit appropriately? In order to change the zoning, there would have to be some sort of change of conditions. What the County, if it had retrospect to rezone, would or would not do, I don't think is the point at issue. Furthermore, if you are going to take that step one step further and say, well, they could ban the use altogether, so why not let them ban it against foreign commerce? I would say that that is going to open up a very novel and new way for local jurisdictions to accomplish what they could not have done previously, rather than having a law saying, thou shall not sell wheat outside North Dakota, or thou shall comply with the North Dakota Grain Act, we will simply make all agriculture subject to the conditional use permit.

THE COURT: This isn't agriculture, Counsel. This is carrying on a business, a certain type of business, in a zone. I would assume that, in Minnesota, they could prohibit agriculture in the center of a city under their zoning.

MR. KRONBERGER: Well, your Honor, I think that the California Supreme Court went to that question; did the County of Imperial regulate commercial uses? The Supreme

Court said quite explicitly that this is not a regulation designed to accomplish the traditional land use things that we talked about. It is not a condition of the operation of the business. It is not designed towards preventing a public nuisance. It doesn't fit in with the kinds of things that we have talked about when we think of zoning in the Amber v. Euclid. Rather, it is a flat out restriction of the sale of water outside of the County. If the County is going to regulate commercial uses, they can't regulate the uses in such a manner as to bar completely foreign and interstate commerce. Could the City of San Diego say, this is a commercial zone for all purposes except anybody engaging in interstate commerce?

THE COURT: I think I understand your position. I just asked you the question.

MR. KRONBERGER: Thank you, your Honor.

THE COURT: Lets hear from you.

MR. HARMON: Thank you, your Honor.

I am James Harmon, County Counsel for the County of Imperial. I represent the County defendants. That is, all the defendants, other than Mr. McDougal.

Your Honor, if I can attempt to address my comments initially to the point that the Court raised last in its comments, I would like to.

I think it is important to recognize that the use right and the restrictions which attach to this particular subdivision lot were indeed under the original jurisdiction of the County. The County granted a use permit to Mr. McDougal's predecessor, Mr. Simpson, in 1967, and, of course, the validity of the restriction in that permit has been the subject of really tedious litigation which has now gone on in the State Courts for nearly five years. And, importantly, the California Supreme Court has very recently affirmed the judgment of the

Superior Court insofar as it held that Mr. McDougal is prevented from acting contrary to the restriction in his predecessor's permit. The Court ruled in that Mr. Simpson in 1967 had accepted the restriction. By the way, the record in the trial court — state trial court — reflects that Mr. Simpson was represented by counsel in 1967 and that he and his counsel agreed to remove from their application any proviso which would authorize sale of water outside of the County. So Mr. Simpson in '67 agreed to the restriction. He abided by the restriction for some five years, and, of course, benefited by having a conditional use permit which did authorize the sale of water for local consumption.

Now, I think it is clear that the plaintiffs can not now come along and relitigate this case. They can not, by simply asserting that they desire to engage in foreign commerce, enlarge the uses which Mr. McDougal had and which attach to the property. Maybe, what I am trying to say is that this judgment of the State Court is an in rem judgment or quasi in rem. It restricts the use of Mr. McDougal as the owner of this particular subdivision property. Any right which exists here exists in the property owner, McDougal. And the fact that now the plaintiffs want to use the property in foreign commerce can not expand the rights that McDougal has. If you carry the plaintiff's arguments to their logical extreme, it would seem to me that not only Mr. McDougal, but perhaps the surrounding property owners in the Yuha Estates, could now conduct commercial operations and engage in foreign commerce. Indeed, McDougal's neighbors out there have wells on their properties and they use the water for domestic purposes. I submit that, again using the rationale of the plaintiffs, that should they sue one of these property owners, asserting that they want to use the water in interstate commerce, the extension of the argument is

that everyone would have the right to conduct a commercial type operation.

Now, three levels of courts in the State of California have affirmed the restriction in the permit. As we attempted to show by attaching the Findings of Fact and Conclusions of Law of the trial court, the trial court concluded that the restriction was inserted by the county planners to further a proper police power objective. The evidence adduced at trial indicated that, in 1967, the county planners were very well aware of the fact that authorizing sales of water for use in Mexico where there is a tremendous market, would create a very, very intensive land use and, in the trial court record, is a reference to the so-called Clifford Well, which is up eight miles north of this area and which has been operating since sometime in the mid-fifties. They — Mr. Clifford now is successor — have had contracts with Mexican water distributors and this results in an extremely intensive land use, many trucks rolling into the premises every day and departing, so the planning commissioners — the Board of Supervisors, in 1967, recognizing that there was a valid objective to be achieved by allowing Mr. Simpson to sell water to his neighbors who were just building their houses, and many of them had not drilled wells at that time, believed in their wisdom at that time that by imposing such a restriction, it would foster a valid land use objective.

Now, again, the Supreme Court — the California State Supreme Court — didn't believe that there was sufficient evidence in the record to support certain of these findings, but the California Supreme Court placed great emphasis on the fact that Simpson and his attorney in 1967 acceded to the inclusion of the restriction and Simpson had abided by it for five years. And so the Court held that Mr. McDougal could not come along five years later and, basing all of his

rights on a 1967 use permit, then turn around and challenge a restriction inherent in the use permit.

In short, the California Supreme Court found that this was a classic case of estoppel. Now, that is a decision on the merits.

Now, the plaintiffs now would like to argue — or do attempt to argue in their points and authorities, that the case has not somehow been decided by the California courts. But, your Honor, I assure you, this very issue has been raised time and again for the last five years. With due respect, hearing counsel argue it again, it sounds like a broken record. We have been involved in this case for five years. That is, the issue of the assertion that the restriction is violative of the Interstate Commerce Clause has been argued over and over again — before the trial courts — before the District Court of Appeals, and before the California Supreme Court. We think that it is clear that the doctrine of res judicata should apply here to bar the plaintiffs' action. It is clear that the issues the plaintiffs are trying to raise are the identical issues that have been litigated over the last many years.

We also think that the pleadings by themselves establish a sufficient relationship between the current plaintiffs and McDougal so that they should be bound by the decision of the California Supreme Court.

Mr. Munoz, at all times in this action, has been Mr. McDougal's broker for the sale of water in Mexico. He was the broker in June of 1972. I presume that he could have intervened in the action then, but he chose not to, but he has very actively participated in these proceedings. As indicated by the papers that we have filed, the original answer to the County's complaint contained the declaration of Mr. Gallego Munoz. He and his counsel appeared as amicus

before the California Supreme Court. The counsel for Mr. Munoz argued before the California Supreme Court. Now, I notice that in the response filed by the plaintiffs, apparently, there is a denial that Mr. Munoz did participate as amicus, but I would invite the Court's attention to pages 12 and 13 of the verified complaint in this case. Commencing, your Honor, at the bottom of page 12, I would like to read a portion of this verified complaint.

> Line 32, page 12: "Plaintiffs herein appeared before the California Supreme Court in decision number L.A. 30681 by virtue of an amicus curiae brief filed on their behalf; that by virtue of the decision of the California Supreme Court attached hereto as Exhibit "A" any actions brought by plaintiffs in the judicial system of the State of California would be an idle act; that plaintiffs herein have exhausted all of their remedies within the state courts in an attempt to assert their rights to engage in foreign commerce, and that plaintiffs have no claim, speedy and adequate remedy in the ordinary course of law."

Your Honor, as I interpret that verified statement, that the plaintiffs have participated in the state court proceedings. Now, the case having finally been decided against their principal, Mr. McDougal, they are simply attempting to relitigate the case, starting again in the U.S. District Court.

We submit, your Honor, that the doctrine of res judicata does apply.

THE COURT: Counsel, has anybody met this question of the burden on the interstate commerce head-on?

MR. HARMON: Yes, your Honor, in our briefs filed at all state court levels, we attempted to meet the interstate commerce question head-on. Of course, the finding of the trial court was that this was not a direct form of interference

and that the rationale of the county planners was consistent with a valid police power objective.

We have read the cases. We don't know — we don't agree that the City of Altus Case is on all fours. That is a case involving Texas and Oklahoma water law.

We have cited in our briefs a very old United States Supreme Court case written by Oliver Wendell Holmes, wherein one state, as I recall, it involved a navigable body of water in New Jersey. The holding was that the state could prevent the diversion of the water to another state. It is not at all clear to us that the County would be prevented from imposing just such a restriction in a use permit.

But I would like to reiterate, your Honor, that the important thing here is that the California Supreme Court heard the issue raised and in a decision on the merits concluded that McDougal is estopped from raising that restriction. Now, the facts on which that estoppel was based certainly can be presented, if the Court so desires, but that is a perfectly proper utilization of an equitable doctrine in the state courts which is likewise recognized in the federal courts.

Now, Mr. McDougal, of course, is adamant that the California Supreme Court erred in its ruling, but the remedy is not to allow some kind of a back door collateral attack through the U.S. District Court. His remedy, if any, is to petition the United States Supreme Court for certiorari. He has indicated that he intends to do that, and he obviously has a right to do that. But here, I submit, your Honor, that the plaintiffs are clearly barred.

Now, your Honor, on the matter of the preliminary injunction, I would like to very briefly comment. We feel very strongly that there are serious jurisdiction problems that the Court should conclude that it lacks jurisdiction. But

if the Court finds that it has jurisdiction and determines to proceed, then we urge that no preliminary injunction issue without a full trial on the merits. The County, in such a trial, could then at least have the ability to attempt to re-establish the same facts that were established in the Superior Court in and for the County of Imperial in 1973, going back to 1967, and addressing the rationale for the restriction. We would also then have the opportunity to establish facts through introduction of evidence upon which the California Supreme Court based its estoppel finding. But it is clear to us, based on the affidavits, that Mr. Munoz is suffering no irreparable harm now. He has access to the Clifford Well, by his own admission and his affidavit. He is paying something like 40¢ per 1,000 gallons more at the Clifford Well than he would if he could buy water from Mr. McDougal, but this operation, the McDougal operation, has been enjoined since 1973. Where is the immediate irreparable harm?

Now, insofar as the matter of probable success at trial, your Honor, I submit that the County's enactments and conditional use permits are entitled to presumptive validity, and that the Court should not, without a full trial, overrule the County's enactments.

Again, three levels of courts in California have reached the same conclusion, based on an extensive set of facts. The files in this case reach all the way across my desk. This has gone on for five years. I can not see how the U.S. District Court could, in the proper use of discretion, grant a preliminary injunction without a trial.

Again, your Honor, we don't think the Court has jurisdiction.

THE COURT: How about diversity jurisdiction?

MR. HARMON: Your Honor, I agree that diversity jurisdiction provides a basis for plaintiffs getting into Federal

Court. Here, though, the same persons with diversity jurisdiction had such a relationship with McDougal in '72 and they should be regarded to be barred under the doctrine of res judicata. Munoz was the broker to McDougal. He clearly had a financial interest in the decision of County of Imperial v. McDougal. He participated in the case through the filing of a declaration at the trial court level. The briefs filed with the District Court of Appeal refer to the Munoz relationship with McDougal. Again, he argued — or counsel on his behalf argued — as amicus before the California Supreme Court. Surely, Munoz didn't have the right to sit back on the sideline and not intervene, just to put himself in a position to go out forum shopping after the final decision of the California Supreme Court. That is precisely what is going on here.

THE COURT: He technically wasn't a party to the action.

MR. HARMON: I agree with that.

THE COURT: The Supreme Court could make no order for or against him.

MR. HARMON: I agree.

THE COURT: If that be the case, they don't have jurisdiction over him; do they?

MR. HARMON: I agree with you. Of course, the judgment was affirmed. The judgment of the trial court went to McDougal and all persons acting in concert with him, but I agree with what the Court is saying, that Munoz was not a party. In reading the cases, we think they say that the Court has to take one case at a time to determine whether a sufficient relationship exists between the parties so as to cause the doctrine of res judicata to apply. We agree that he was not a party. Obviously, having participated as amicus alone, that is not enough on which to base a decision for the doctrine of res judicata to apply, but what is more im-

portant here are the admitted statements in the pleadings that Munoz has from the start of this litigation been involved with Mr. McDougal as his agent — as his broker. They have been in business together involving the exporting of water to Mexico. Munoz obviously could have intervened. I don't know that there was any way that the County could have forced him to intervene, but based on these kinds of facts, based on the verified statement in the complaint that the plaintiffs herein have exhausted all of their remedies within the state courts, I submit, your Honor, the doctrine of res judicata does apply.

THE COURT: Mr. Luftig?

MR. McDOUGAL: If it please the Court, your Honor—

THE COURT: Yes.

MR. McDOUGAL: Donald C. McDougal, Jr., appearing in behalf of Donald C. McDougal.

Your Honor, this Court has asked a question of my co-counsel, the defendants — which I don't know why they have — they may have forgotten, but the question this Court asked, did any Court ever head-on hit this issue upon Constitutionality? Now, realizing that the decision of the Appellate Court of the State of California for —

THE COURT: Division one.

MR. McDOUGAL: Right, your Honor. In their decision, even though the decision was vacated by the Supreme Court in the State of California, they did hit this issue head-on, and I would quote directly from page 6 of that decision, which —

THE COURT: Counsel, is that a published decision? Am I entitled to rely upon that?

MR. McDOUGAL: I don't know that the Court is. I am just going to answer the Court's question. The counsel for the defendants here has said that each court at each step of

the proceedings has reached the same conclusion, and that is totally in error.

THE COURT: I have read Eyman's opinion, the trial court — a very fine judge. I have read the Supreme Court decision. Neither one have said yes or no on that. They have discussed it briefly or intimated, but that is not the question that I asked. I have to determine whether this is an undue burden on interstate commerce.

MR. McDOUGAL: I believe that is the question that the Court must decide. I also believe that this Court is correct in reading the Supreme Court decisions. I believe that, since I filed on behalf of my client, the appeal to the State Supreme Court and fought up at the State Supreme Court to have Judge Eyman's findings vacated, that they should not be cited to this Court, but since they have been — vacated cited to this Court — briefs that I have read sent to my office, I feel the Court, then, if that is proper, which I don't contend it is, but if it is proper, I think the Court just as rightly should properly be allowed to find what were the findings of the Fourth District? Did they ever hit the issue head-on? If the Court wishes, I will tell the Court —

THE COURT: I have it here.

MR. McDOUGAL: All right, if the Court has it, page 6 of that decision says, head-on, McDougal contends that condition imposed, i.e., not to sell water for outside the County of Imperial, is an unlawful attempt to regulate international commerce, violation of Article 1, Section 8, Clause 3, of the United States Constitution, which reserves that power of Congress. We agree. That is the issue head-on.

THE COURT: But that is not a decision, Counsel. That is just a wasted effort. It was Judge Ault that wrote it. It was a wasted effort on his part.

MR. McDOUGAL: Since the Supreme Court vacated the decision, that is correct, your Honor.

Your Honor, in defense of McDougal in this action, first off, we would state for the record that our defense is the State Supreme Court decision in the State of California. We are under an order to only sell our water for use inside of Imperial County. We are abiding by that order. In fact, the commercial well operation located on our commercial site has been open since July 15 and is open presently. We are selling water to all customers who want to purchase at the stated rate of a $1.00 per 1,000. The point, I think, that is important here is that the State Supreme Court, after much litigation has affirmed that my client has a vested property right to conduct his commercial operation. That property right was taken away from us by the Supreme Court — taken away from us again for different reasons, and the Supreme Court reversed all prior findings and reestablished that property right as a vested property right. The problem I have in this case, as I am sure the Court is well aware, is that it is the contention of the defendant, McDougal, that, once we remove the water from the ground and place it into our storage tanks, it becomes my client's property. The County of Imperial has no zoning rights over my client's personal property. Over his land property, yes, but over his personal property, once it is in his physical possession, no. But the State Supreme Court in its wisdom, for whatever reasons decided that we were estopped to raise that very issue, and said in Footnote 3, that they would not get to the Constitutional issue that the plaintiffs have raised in this court.

It is our position that whatever this Court or any other court orders us to do, as we have done throughout the litigation of this case for four years and possibly eight months, we will follow. We have always followed every

court order. We will continue to follow every court's order. I will state to the Court that we are following the order of the State Supreme Court of California now, even though we may think it is wrong, nonetheless, we will continue to follow it until another court tells us differently. That is the situation we are in. And that is our defense in the action brought by the plaintiffs. Whatever the Court orders and until we get a relief from that court order in some manner, we will continue to operate in the manner we are.

THE COURT: Counsel, what position does it put you in as a land owner. Assuming for the moment that I grant the issue of the preliminary restraining order, that is fine, and we start selling water to Mexico, and the trucks come up every hour on the hour, or every forty minutes on the hour, and the neighbors complain and they go to the Board of Supervisors — I assume it is in the County — and the Board of Supervisors then say, well, it is in violation of the conditional use permit, we will revoke that and say that no water shall be sold.

MR. McDOUGAL: Your Honor, the State Supreme Court, I think, has ruled rather clearly, they can't revoke our conditional use permit. The case of the Transatlantic Oil Company v. City of Santa Barbara established that rule in California back in 1948. The conditional use permit is a property right. The only way they can take that away from us is by condemnation. If they want to compensate my client and pay us for the value of the property right, they have the right to do that at any point in time they wish. They can condemn the property and take it, but they can't on-zone us. You can't go down here and say, we have zoned you a hospital, but for some reason, we think you might have violated a condition on the permit, so consequently, we are going to on-zone your hospital. It doesn't work that way, your Honor. The conditional use permit is a property right

and they can only take it by due process, which means compensation.

THE COURT: That is what our county is going through now on Rancho Sante Fe area. They changed their mind.

MR. McDOUGAL: Yes, your Honor. Mr. Kronberger is involved with me on that very case.

Your Honor, the key here that I think is before this Court on that issue is that, if this Court issues an order that tells my client to sell water, it doesn't restrain —

THE COURT: I wouldn't issue such an order. I would issue an order, if I would issue one, that would not restrict you from doing it. It would be up to you to sell it.

MR. McDOUGAL: All right, your Honor, I understand, but what I was about to say, if this Court issued an order, as one of the orders prayed for, ordering us to sell to —

THE COURT: If I were to grant an order, it wouldn't be to sell to anybody. It would be lifting the restriction as a burden on interstate commerce. I am not going to tell you to sell. I don't know how much water you have, and so forth.

MR. McDOUGAL: I thank the Court for giving us the right to make the decision to sell. The point is, your Honor, if this Court issues an order that does not in my opinion as counsel for the defendant keep us immuned from any possible action by the County in the sense of removing our property right, I will instruct my client not to sell.

THE COURT: Well, that is a decision that you have to make.

MR. McDOUGAL: That is the reason that I am not worried about the ultimate effect, the County revoking the permit. I won't let that happen.

Also, your Honor, the decision of this Court is something that, you know, we have no control over, in a sense, other

than to argue. We are following another court's order. Your Honor asked a question before the other question —

THE COURT: You just kind of like to get an order to let you sell to the Republic of Mexico?

MR. McDOUGAL: Your Honor, I will be honest with the Court, there is no doubt — we have litigated this issue for four and a half years — my client wishes to sell to anybody who comes in his place of business and wants to buy, whether it be from the Mexico area, Arizona, Canada — we don't care who it is. We have a product, a personal piece of property, that we have produced that we want to sell. And we are now under an order not to sell to everyone, except County of Imperial residents. And I have to agree with the argument of plaintiffs, we have been placed under a home embargo, and until some court somewhere lifts the home embargo, we will abide by it.

Thank you, your Honor.

THE COURT: Mr. Luftig.

MR. LUFTIG: Briefly, your Honor, the issue of unconstitutional conditions, if this were the McDougal case, which it isn't, frankly, because our case is much simpler than McDougal. Our case, simply by virtue of the doctrine of collateral estoppel — all the issues that are the foundation for a court's determination of application of the Commerce Clause, that is, discrimination is one of the major pegs. The other major peg is an onerous burden that has always been held that complete prohibition is such an onerous burden, that they have all been established by collateral estoppel against all defendants, which we, as plaintiffs, can't assert under the doctrine established by Justice Trainer of the California State Supreme Court, when he expounded on the doctrine of collateral estoppel, that there doesn't have to be mutuality. So we have collateral estoppel, that there doesn't

have to be mutuality. So we have collateral estoppel. All the foundational issues have been solved. All the Court has to do is to merely rule upon the federal question which the State Supreme Courts didn't get to, that is now laying there. The Court has abjured jurisdiction and said, we won't reach the federal question involved. Since the State Supreme Court of California has failed to reach the issue, it is for this Court, in its normal duties, to reach that issue. And when one applies the doctrine of collateral estoppel to the fact that the State Supreme Court has failed to reach the constitutional issue, we find clearly that the defendants are estopped from denying the very facts which are the basis for the application of the injunctive relief enforced in the Commerce Clause, but I would speak briefly from the position of McDougal, had the courts ever reached below his position as a federal question, which they never did do, except in a vacated decision — I will ignore that. The doctrine of unconstitutional conditions would be completely 100% dispositive of the matter. That doctrine, if your Honor will note, from the cases which I cited in my opening brief, developed under litigation concerning the Commerce Clause, this very clause that is at issue before the Bench, and it developed along these lines, your Honor — developed primarily from foreign corporations seeking to come into the state and seeking to get a permit to do business in the state under state law. There were attached to the permits certain conditions which violated two different fundamental federal rights. One was the Commerce Clause. It was held that many of the conditions violate the Commerce Clause. And they developed these Commerce Clause cases. The second right that they were invading — federal right that they were invading — was the right of a foreigner to seek to go into the federal court, either by diversity of citizenship or because a federal matter was involved, and they were annexing a condition

to these permits to come into the state and the condition was that you give up, not only in some cases, the Commerce Clause rights, but under other cases, the right to seek relief in the federal courts. Those cases first reached the courts — the United States Supreme Court and the various district courts by way of the Commerce Clause cases. Among them, the case cited at page 17 of my opening brief, in Barron v. Burnside, 121 U.S., 186, I will just quote a little piece of that. "The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all of the cases in which this court has considered the subject of granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has been uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitutional laws of the United States." So in an interstate Commerce Clause context coming up, the vehicle being these corporations asking for a permit, and attached to that permit was an invidious attack on the Constitution, i.e., the Commerce Clause. The Courts held, you can not attach — you can not get in sideways, your Honor. You can't attach to a right which perhaps the state had a right to reject in the first place. In other words, the state doesn't have to permit for every corporation to come in and do business in its state. But if it does do that, it can not attach a condition which amounts to bartering away the Federal Constitution. And having begun in the Commerce Clause, it went over to other cases, including this one about getting into the federal court. The reason I would like to get into that is because the best language is in Terrol v. Burke, which I quote everywhere in the brief, but particularly, at page 19 and 20.

Let me just read a little language from Terrol because Terrol reaches the very question of, having given up the right, can you thereafter come back because you violate the condition which was unconstitutional and take away the right, which it could have refused to give in the first place. In Terrol, this language recites the Commerce Clause cases, as well as the question which was advanced in Terrol, the ban on going into the federal court.

Here is what Terrol says. "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort the federal courts or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not." The emphasis is by me, whether waived in advance, or not. So, starting out with a Commerce Clause case and going farther — in fact, they went so far that in Danskin, which I also cite in my brief, which is a California State Supreme Court case, they held that doctrine of unconstitutional conditions, the best exposition of which — outside of the cases I have cited — is in Witkin on Constitutional Law, which I also cited, Danskin says that you can't attach — that the San Diego City School District could not attach an unconstitutional condition to its opening up its doors and letting people in to use its public schools for public meetings. In that case, it was the First Amendment rights that were attacked, but it makes no difference. But these cases, Terrol recites, there are three major fields — two major fields in which this invidious attack upon the United States Constitution, if it comes up in the form of a condition attached to a grant of right, it is itself unconstitutional and the questions are specifically federal questions to be addressed by federal courts. So we have purely this,

your Honor, that all the foundational matters for this Court actually to go to a final judgment, in fact, is established by collateral estoppel. The federal question was not pursued by the State Supreme Court, although, obviously, it had jurisdiction so to do — chose not to do so. It is exactly as the situation was in Hale v. Bimco. There, the Florida Supreme Court, for whatever reason, refused to rule upon the federal question, the federal attack — the attack upon the United States Commerce Clause, the very clause that is involved here. And the United States Court says, because the state didn't rule on it, but the case involves it, does that mean that no one may ever reach that matter? Surely, where it comes by virtue of a third party, whose rights are invaded to do foreign or interstate commerce, surely, the federal courts are not helpless in that matter. That is my argument.

THE COURT: Isn't the question here as to whether or not the County has imposed an unreasonable burden or unreasonable interference with interstate commerce? They have a right to burden and interfere with, but it is a question of whether it is unreasonable interference. Everything is some burden. If you come into the State of California and you have to file an application with the Commissioner of Corporations, that is a burden, but is it unreasonable?

MR. LUFTIG: Yes, that is the question, and the answer, I would say, is that the cases hold that, where it is discriminatory against the foreign or interstate commerce, or the burden amounts to a total prohibition against interstate or foreign commerce, that has uniformly been held to be an invidious assault upon the Commerce Clause and an onerous burden, and an unconstitutional burden, your Honor. There are other tests whereby lesser impositions are held to be invasions or not invasions, but when it comes to those which are discriminatory against the foreign or interstate commerce, are those who wholly prohibit it in favor — wholly

prohibit it — period — either one of those has been everywhere held to be unconstitutional.

THE COURT: Anything further, gentlemen?

MR. HARMON: Very briefly, your Honor, I did not refer in my initial argument to 28 U.S.C., Section 2283. That was the anti-injunction statute. I think that is a relevant federal statute. It reads in part: "A court of the United States may not grant an injunction to stay proceedings in a state court, except as expressly authorized by an Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgment."

There has been a very recent case cited by the United States Supreme Court, which interprets the meaning of the anti-injunction statute. That case, your Honor, is Vendo Company v. Lektro-Vend Corporation. That case is cited in the June 29th issue of Law Week, your Honor, a very recent case.

THE COURT: I have the decision here.

MR. HARMON: Again, your Honor, addressing the matter of whether the question before this Court is whether the restriction is an unreasonable burden on interstate commerce, we assert that is really not the major issue, that the federal court should, based on the facts relied upon by the California Supreme Court, give comity to the estoppel determination by the United States Supreme Court. I don't want to belabor the point, but Simpson, in 1967, was represented by an attorney. That attorney simply agreed to remove from his permit the right to sell water to Mexico. Now, five years later, an entrepreneur comes along and finds the conditional use permit, bases his right entirely on the fact that a use permit was granted and then turns around in the same breath challenges the inherent restriction. I think

that is basically an inequitable position of the plaintiffs in this case, your Honor.

THE COURT: Very well, the matter will stand submitted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

NOTICE OF RELIANCE UPON A BROADER CLAIM OF INTERFERENCE WITH FOREIGN RELATIONS EXTENDING BEYOND THE CONFINES OF ARTICLE I, SECTION 8, CLAUSE 3, AND ALSO TO CONTEND THAT EVEN AS TO ARTICLE I, SECTION 8, CLAUSE 3, THE FEDERAL GOVERNMENT'S POWER AS TO FOREIGN COMMERCE HAS THE BROADEST ASPECT

Filed August 25, 1977

Come now plaintiffs and assert for purpose of making their contentions more specific that:

1. Plaintiffs rely upon a claim that the nation possesses foreign affairs powers other than those specifically enumerated in the Constitution. *Bethlehem Steel Corp. v. Board of Commissioners*, 276 CA 2d 221, 80 Cal. Rptr. 800. See 276 CA 2d 224.

2. This power over foreign affairs is *inherent, exclusive and plenary*. It does not depend upon the affirmative grants of the constitution both because of express prohibitions on the states in this field and because only the Union is vested with the attributes of national sovereignty. For national purposes embracing our relations with foreign nations, we are

but one people, one nation, one power. *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 224.

3. The powers of external sovereignty do not depend upon the affirmative grants of the Constitution but are vested in the Federal government as necessary concommitants of nationality. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-316; 81 L. Ed. 255, 260-261; 57 S.Ct. 216; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 225.

4. The exclusivity of the Federal government's power in this sphere is predicated upon the unrefutable postulate that though the states were several, their people in respect of foreign affairs were one. Hence, the external affairs of the United States are exercisable without regard to state laws or policies and are not and cannot be subject to any curtailment or interference on the part of the several states. *Bethlehem Steel Corp. v. Board of Commissioners,* 276 CA 2d 221, at 225.

5. Acts such as the California Buy American Acts, which amount to a home embargo, amount to an unsurpation of the power of the Federal government to conduct foreign trade policy. That there are countervailing state policies which are served by the retention of such an act is wholly irrelevant to judicial inquiry. *United States v. Pink,* 315 U.S. 203, 233, 86 L.Ed. 796, 819, 62 S.Ct. 552; *Bethlehem Steel Corp. v. Board Commissioners, supra,* page 225.

6. Only the Federal government can fix the rules of fair competition when such competition is on an international basis. Foreign trade is properly a subject of material concern, not state regulation. State regulations can only impede not foster national trade policies. The problems of trade expansion or non-expansion are national in scope, and properly should be national in scope in their resolution. The fact

that international trade forms the basis of this country's foreign relations is amply demonstrated by the fact that the United States has commercial treaties with 38 foreign nations and tax treaties with 31 and is a party to many other international treaties and agreements regulating directly or indirectly its commercial relations with the rest of the world. *Bethlehem Steel Corp. v. Board of Commissioners, supra, at page 226.* See, in addition to the foregoing, treaty with Mexico designating Mexico as a beneficiary developing country for commerce preference purposes, 19 USC §1202(c), General Headnote 3c of the Tariff Schedules.

7. These foreign trade problems are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a state created difficulties with a foreign power. *United States v. Pink, supra,* at page 232; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 227.

8. Since the California courts concluded the Federal power, whether or not exercized is exclusive in the field of foreign trade, it was not necessary to determine if the California Buy American Act was in conflict with any specific Federal legislation. *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 227, footnote 9.

9. We need not await an instance of actual conflict to strike down a state act which purports ro regulate such a subject matter. The opportunity for potential conflict is too great to permit the operation of the state law. *Purdy &. Fitzpatrick v. State of California,* 71 Cal. 2d 566, 577, 79 Cal. Rptr. 77, 456 P. 2d 645; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 227, 228.

10. Acts in the field of foreign trade have more than some incidental or indirect affect in foreign countries. They have a great potential for disruption or embarrassment and

appear to be the result of selfish provincialism rather than an instrument of justifiable policy. It is a type of protectionism, which invites retaliative restrictions on our own trade. *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 228.

11. Our system of government is such that the interests of the cities, counties and States no less than the interest of the people of the whole nation imperatively require that Federal power in the field affecting foreign relations be left entirely free from local interference. To permit State legislation to concurrently operate in this sphere would very certainly imperil the amicable relations between governments and vex the peace of nations. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304, 62 L.Ed. 726, 732, 38 S.Ct. 309; *Bethlehem Steel Corp. v. Board of Commissioners, supra,* at page 229.

12. Commerce with foreign countries is of national importance and admits and requires uniformity of regulations and no State may intrude in it even absent Congressional legislation whether in the guise of a licensing requirement as in *Welton v. Missouri* (1975) 91 U.S. 275, 279-280, 23 L.Ed. 347, 349. *Brown v. Maryland* (1827) 25 U.S. (12 Wheat.) 1, 6 L.Ed. 23, a grant of exclusive privileges or a franchise (*Gibbons v. Ogden* (1824) supra, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23) or inspection and fees therefor. *Hale v. Bimco Trading Co.* (1938) 306 U.S. 375, 83 L.Ed 771, 59 S.Ct. 526, concurring opinion in *Bethlehem Steel Corp. v. Board of Commissioners, supra,* page 231.

Lodged herewith is a copy of the *Bethlehem Steel Corp. v. Board of Commissioners* case for the convenience of the Court.

Dated: August 25, 1977

/s/ MURRAY LUFTIG
WILLIAM H. KRONBERGER, JR.
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No 77-491-T

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, vs. County of Imperial, Superior Court of the State of California, in and for the County of Imperial; James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants.

COUNTY'S NOTICE OF APPEAL

Filed September 12, 1977

Notice is hereby given that the County of Imperial, and its Board of Supervisors, officers, agents and employees, hereby appeal to the United States Court of Appeal for the Ninth Circuit from the order granting motion for preliminary injunction and preliminary injunction, entered in this action on the 2nd day of September, 1977.

Appellants are presented in their appeal by James H. Harmon, County Counsel, whose office is at the Courthouse, 939 Main Street, El Centro, California. Appellees are represented by Murry Luftig, with offices at 1010 Second Avenue, Suite 2300, San Diego, California 92101.

Dated: September 12, 1977

/s/ James H. Harmon
JAMES H. HARMON, County Counsel
Attorney for Appellants

Supreme Court, U. S.
FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1003

COUNTY OF IMPERIAL AND THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

Appeal From United States District Court, Southern District of California.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM H. KRONBERGER, JR.,
1007 Fifth Avenue, Suite 1100,
San Diego, Calif. 92101
Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents.

Appeal From United States District Court, Southern District of California.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents are individuals and respectfully pray that a Writ of Certiorari be denied and that this Court decline to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceedings on July 26, 1979.

Question Presented.

Where the California Supreme Court refused to determine whether a restriction against the sale of water for use outside of the County of Imperial constituted a violation of the Commerce Clause of the United States Constitution, may third parties not involved in that prior litigation invoke the jurisdiction of Federal Courts to declare such restrictions against the sale of water to be violative of the Commerce Clause provisions of the United States Constitution as an impermissible burden on foreign and interstate commerce?

REASONS FOR DENYING THE WRIT.

I

Petitioners Have Failed to Set Forth Any Grounds for the Granting of the Writ Within the Purview of U.S. Supreme Court Rule 19, 28, U.S.C.

Respondents herein believe that the decision of both the Court of Appeals for the Ninth Circuit and the decision of the United States District Court, for the Southern District of California, speak for themselves and are on point with respect to the merits of the case. Respondents will confine their discussion herein to an analysis of the grounds upon which Writs of Certiorari are generally granted. It is the contention of Respondents that the petition filed by the County of Imperial sets forth no grounds upon which this Petition for Certiorari should be granted. To that end, the argument will be confined to an analysis of the provisions of Rule 19 of this court and how such provisions relate to the case at hand.

Rule 19 provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The California Supreme Court has not decided any federal questions raised in the instant case. The only decision of the California Supreme Court bearing even remotely upon

the issues raised herein was the decision by that court not to rule on the question of whether or not the restriction against the sale of water constituted a violation of the Commerce Clause Provisions of the United States Constitution. In a nutshell, the question raised in the instant federal litigation was specifically not decided in the California litigation between the County of Imperial and defendant Donald C. McDougal.

In fact, as the California Supreme Court stated in *County of Imperial v. McDougal*, 19 Cal.2d 505, at page 511, 138 Cal.Rptr. 472, 564 P.2d 14 (1977):

> "In view of this conclusion, *we need not decide* whether the prohibition against the export of water was valid. (See, *City of Altus, Oklahoma v. Carr* (W.D. Tex. 1966) 255 F.Supp. 828) . . ." (Emphasis added).

In view of the California Supreme Court's express language, it can hardly be stated that the court has decided any federal issue, let alone reached a decision in conflict with federal law. The most that can be said of the California Supreme Court's refusal to decide the federal issue is that, at least as far as these Respondents are concerned, the language is an open invitation to bring the federal suit.

Continuing with the analysis of the grounds for certiorari, Rule 19(b) provides for review:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . ."

Such is certainly not the case in the instant matter. In fact, the decision of the Ninth Circuit Court of Appeals is specifically in accord with the decisions of its sister circuits and the explicit decision of the District Court for the Western District of Texas affirmed by this court in *Altus, Oklahoma v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), aff'd, 385

U.S. 35 (1966). The City of Altus was challenging a Texas statute which forbade the drilling of a well in Texas and transporting the water outside of the state. The court found that such a prohibition of the interstate shipment of water was unconstitutional. Not only is there no conflict between the circuits, it is clear that there is harmony.

Further review of Rule 19 sets forth additional grounds where the Court of Appeal:

> ". . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law; . . ."

Neither the District Court or the Court of Appeals for the Ninth Circuit decided any important state questions in conflict with applicable state law.

Petitioners attempt to claim that a federal constitutional decision that a county may not control the export of water somehow conflicts with a state decision not to decide the the constitutional question of regulating commerce because the particular party before the state court was estopped to raise the issue. Petitioners' reasoning is circular at best and in no way rises to the dignity of demonstrating that the Court of Appeals decided an important state question in conflict with state law. Not only is the question a federal one rather than a state one, there has been no state judicial pronouncement on the constitutionality of a county regulation on export to foreign countries and states.

Rule 19 goes on the provide for the granting of a Writ of Certiorari in circumstances when the Court of Appeals:

> ". . . has decided an important question of federal law which has not been, but should be settled by this court; . . ."

All issues presented in the instant litigation have been before this court and in fact, settled. The question of pro-

hibitions against the shipment of water outside of a state's boundary has been decided in *Altus, Oklahoma v. Carr, supra,* and more recently expounded upon by this court in *Hughes v. Oklahoma,* 99 S.Ct. 1727 (1979). It is hard to imagine a case more directly on point that *Altus, supra.* There is no need for additional case law on the subject of the application of the Commerce Clause by the Court of Appeals or the district court.

The question of the ability of third party litigants to challenge a regulation on federal grounds is clear, even in circumstances where the same issue is under review in a separate state proceeding. *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939). In the present case there are *no state* proceedings pending, the judgment that McDougal is estopped to challenge the constitutionality of the County of Imperial's prohibitions against interstate and foreign commerce having become final. Petitioners cite *Vendo v. Lektro Ven Corp.*, 433 U.S. 623 (1977) as a reason to grant the instant writ, yet it should be remembered that *Vendo, supra,* is patently distinguishable on two basic grounds: (1) in *Vendo, supra,* a decision on the merits was reached by the state court while in the present case the California Supreme Court specifically declined to decide the issue; and (2) the parties in *Vendo, supra,* state proceedings were identical with the parties in the federal proceedings while the plaintiffs in the present case are strangers to the prior litigation between petitioner County of Imperial and McDougal in the state court.

There are no new questions of law presented in the petition, the County of Imperial simply seeks a rehearing and rehashing of arguments previously advanced at the District Court and Court of Appeals.

Finally, Rule 19 provides for the issuance of a Writ of Certiorari where the Court of Appeals' decision:

> " . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision."

The foregoing is the last clause of Rule 19(b) setting forth the grounds for review. It cannot seriously be maintained that the decision of the Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this court's powers of supervision. The Court of Appeals for the Ninth Circuit has simply sustained a preliminary injunction holding that allegations regarding *res judicata* cannot be sustained and directing the District Court when reaching the merits of the Commerce Clause question pay particular attention to *Hughes v. Oklahoma, supra.*

II

Conclusion.

The Writ of Certiorari prayed for by Petitioners simply should not be granted. The foregoing analysis of U.S. Supreme Court Rule 19 and the grounds for the granting of the Writ of Certiorari reveal an almost unreal failure of Petitioners to couch its petition in terms of the rules of this court. Nowhere in the petition on file herein are set forth any grounds whatsoever within the confines of Rule 19 for the granting of the petition. Rather, Petitioners simply rehash their older arguments while subtlety ignoring a discussion of the grounds for the issuance of the writ.

Petitioners throughout their brief continue to make the statement that the federal court decisions are somehow in conflict with a final decision of the California Supreme Court. How Petitioners continue to make this argument in the face of the specific findings of the California Supreme Court escapes Respondents. The California Supreme Court

simply never ruled on questions regarding the Commerce Clause of the United States Constitution, it simply cannot be said that the decision of the District Court, affirmed by the Court of Appeals, is in conflict with the non-decision of the California Supreme Court.

Respondents respectfully pray that this court deny the Writ of Certiorari and let the judgment and opinion of the Court of Appeals stand.

Respectfully submitted,

WILLIAM H. KRONBERGER, JR.,

Attorney for Respondents.

Supreme Court, U. S.
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IN THE

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Respondents.

Appeal From United States District Court, Southern District of California.

Reply to Response to Petition for Writ of Certiorari.

JAMES H. HARMON, *County Counsel, County of Imperial,*
County of Imperial Courthouse,
El Centro, Calif. 92243,
(714) 352-3610 Ext. 250,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Contrary to Respondents' assertions, grounds clearly exist for grant of certiorari. In fact, is is imperative that the Court provide for review.

As already discussed, the California Supreme Court upheld the enforceability of the export restriction in Mr. McDougal's use permit based on the adequate and independent ground of estoppel. (Pet. for Cert. C-6.) This Court correctly dismissed McDougal's earlier appeal for lack of a substantial federal question. (434 U.S. 899, 54 L.Ed.2d 187, 98 S.Ct. 294.)

The Court of Appeals has, however, affirmed an injunction which prevents enforcement of the very restriction upheld by the California Supreme Court. A direct conflict therefore exists between the respective decisions of the State Supreme Court and the Court of Appeals.

The conflict in decisions is manifest by the Superior Court's contempt judgment against McDougal. (Pet. for Cert. D-2.) Final determinations concerning said contempt await decision by this Court. (Refer to Pet. for Cert. at p. 5, fn. 1.)

Rule 19(1)(b) of the Court expressly provides for review of a decision rendered by a court of appeals which ". . . has decided an important state . . . question in a way in conflict with applicable state . . . law". Direct conflict between a decision by a federal court of appeals and a judgment by the highest court of a state, where state grounds for decision are applicable, is ground for review of the decision of the court of appeals. (Stern and Gressman, *Supreme Court Practice* (5th Ed., 1978) pp. 280-282.)

Respondents would have the Court believe they are third-party strangers to the McDougal litigation, who are directly attacking a statute on constitutional grounds. (Response to Pet. for Cert. at pp. 5-6, citing *City of Altus, Oklahoma v. Carr,* 255 F.Supp. 828 (W.D. Tex. 1966) and *Hughes v. Oklahoma,* 99 S.Ct. 1927 (1979).) Such portrayal is inaccurate and the authorities cited are inapposite.

Respondents are *not* strangers but contractors of McDougal who desire to export water pumped from his well to Mexico. Guillermo Gallego Munoz, one of the Respondents, participated in the Superior Court

trial and served as *amicus curiae* in unsuccessfully urging the State Supreme Court to find the subject export restriction violative of the Commerce Clause. (Pet. for Cert. at pp. 8-9.)

Neither the *McDougal* case nor Respondents' subsequent action involve a challenge to a statute or county-wide ordinance. In *McDougal*, the State Supreme Court upheld a use permit restriction which affects only a particular parcel. (Refer to Pet. for Cert. at p. 10 and C-5 for the proposition that the terms of a conditional use permit run with the land.)

Respondents are not waging a challenge against any general anti-export policy of the County. They are instead attempting to enlarge on McDougal's property rights. Their action alleges the California Supreme Court erred in deciding *McDougal*. (Refer to Pet. for Cert. at p. 7.) They have in reality been allowed by collateral attack to relitigate the *McDougal* case.

The case of *Hughes v. Oklahoma* (*supra*) has been demonstrated as not on point (Pet. for Cert. at pp. 16-18). *City of Altus, Oklahoma v. Carr* (*supra*) is similarly distinguishable.

In *City of Altus*, the petitioner succeeded in directly challenging a statute enacted to prevent Texas ground water from being transported across the state boundary. As shown, the *McDougal* case involved no such blanket prohibition but, instead, dealt with an export restriction applying to a single parcel.

Mr. McDougal was held estopped from challenging the subject restriction and bound thereby. No analogous decision was rendered by the highest court of the State of Texas in *City of Altus* so as to bring into focus the issues which are here presented.

Further, ground water law in Texas contrasts sharply from that in California. Compare, for example, the doctrine of "correlative rights" as announced in *Katz v. Walkinshaw,* 141 Cal. 116, 74 P. 766 (1903) with the Texas "rule of capture" referred to in *City of Altus, Oklahoma v. Carr* (*supra*) at page 833. Were the County of Imperial to enact a general ordinance designed, to prevent basin overdraft by prohibiting exploration of all local ground water, it is not clear, on direct attack, that *City of Altus, Oklahoma v. Carr* would require such an ordinance to be held invalid.

To conclude, the California Supreme Court finally adjudicated the enforceability of the export restriction in McDougal's use permit using adequate state grounds. Due to the refusal of the District Court and Court of Appeals to heed the doctrine of *res judicata* and provisions of the Anti-Injunction Act, Respondents have by collateral attack emasculated the decision of the State Supreme Court. It is of critical public importance that this Court allow for review of the decision of the Court of Appeals.

Respectfully submitted,

JAMES H. HARMON, *County Counsel,*
County of Imperial,
Attorney for Petitioners.

Supreme Court, U. S.
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BRIEF FOR THE PETITIONERS.

JAMES H. HARMON,
County Courthouse,
939 W. Main St.,
El Centro, Calif. 92243,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 604 F. 2d 1174 (9th Cir. 1979) and printed as Appendix "A" to the petition for certiorari. (A 1-8.) The preliminary injunction issued by the district court (B 1-11) is not reported.

JURISDICTION.

The judgment of the court of appeals was entered on July 26, 1979, and a petition for rehearing was denied on October

17, 1979. The petition for certiorari was filed on December 27, 1980 and was granted on February 25, 1980. Jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTION PRESENTED.

The California Supreme Court ruled the owner of a water well estopped from challenging an export restriction in his conditional use permit and bound by its terms. The question presented is whether third party merchants, residing in Mexico and desiring to purchase water from the well owner for export, may invoke the jurisdiction of the federal courts to enjoin enforcement of the particular use permit export restriction.

STATEMENT.

General Background.

In 1976, W. Erle Simpson (''Simpson'') applied to the County of Imperial (''county'') for a use permit authorizing the sale of water from a well on his premises. The subdivision in which Simpson's parcel was located was governed by deed restrictions providing the lots were to be used for residential purposes. (C 2.)[1] When Simpson applied for his permit, an interim zoning ordinance required a permit for any land uses other than those specifically exempted, and county officials notified Simpson he was required to obtain a permit in order to conduct a commercial water sale business. (C 2.)

Public hearings were initially held on the application before the planning commission, and subsequently, before a joint meeting of the planning commission and the board of

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[1]The opinion of the California Supreme Court in *County of Imperial v. Donald C. McDougal* setting forth certain facts referred to herein is reported at 19 Cal. 3d 505, 564 P. 2d 14 (1977) and is printed as Appendix ''C'' to the petition for certiorari. (C 1-11.)

supervisors. At the commission meeting, two other landowners in the tract argued against the granting of the permit on the ground it would interfere with the quiet enjoyment of their property, and the county's chief planning officer recommended against granting the permit for the same reason. (C 3.)

At the joint meeting of the planning commission and board of supervisors, Simpson, who was represented by counsel, voluntarily withdrew from his application a request to export water to Mexico. (C 6.) Thereafter, a use permit was issued authorizing water sales subject to the restriction the water would be sold only for use within the county. (C 1.)

Simpson did not challenge the export restriction and he accepted the benefits afforded by the permit and conducted himself in accordance therewith. (C 6.) Between 1968 and 1972, only a few tank trucks were loaded with water from the well, and Simpson sold a total of approximately 500,000 gallons of water in those years. (C 3.) In 1970, the tract was zoned for low intensity use and the zoning allowed development of natural resources for commercial purposes only upon the issuance of a conditional use permit. (C 1.)

In June, 1972, Donald C. McDougal ("McDougal") purchased the parcel from Simpson. McDougal was aware of the permit restriction against sale of water for export from the county and knew Simpson had not made intensive commercial use of the well. (C 3.)

McDougal requested the board of supervisors to remove the export restriction from the use permit, but he was advised a new conditional use permit would be required to accomplish this result. (C 3.) Without applying for a new permit, McDougal entered contracts to sell water for distribution in Mexico, and beginning in July, 1972 as many as 44 trucks

a day, with a capacity of 250,000 gallons, loaded water at the well day and night. (C 3.)

Neighboring landowners protested the noise and fumes generated by the traffic and county officials demanded McDougal discontinue his operation. (C 3.) Thereafter, he applied for a permit, but with insistence his application was without prejudice to any subsequent claim no permit was required. The permit was denied, and McDougal unsuccessfully appealed the denial to the board of supervisors. (C 3.) McDougal nevertheless continued his commercial export operation.

State Court Proceedings (and McDougal Appeal to This Court).

The county sought injunctive and declaratory relief against McDougal in the Superior Court of the State of California in and for the County of Imperial (''superior court'' or ''trial court''). The suit alleged McDougal was violating zoning by selling water for export and by employing tank trucks to carry large amounts of water from the well. (C 1.)[2]

In partial response to the county's application for preliminary injunction, McDougal filed a declaration of Guillermo Gallego Munoz (''Munoz''), his broker for sale of water in Mexico, asserting water from the subject well was necessary to meet needs of residents of Mexicali, Mexico. (64a-66a.)[3] The superior court directed an investigation

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[2]A second cause of action alleged the manner in which McDougal operated his business constituted a public nuisance; and a third asserted McDougal was violating the County's Ground Water Appropriation Ordinance. (C 1-2, fn. 2.) The third cause of action was by stipulation bifurcated and not tried. (*Id.*)

[3]Munoz's declaration alluded to the fact another well in the county at Ocotillo was used for export of water to Mexico but he asserted it ''did not satisfy the needs of the people of Mexicali''. (64a.)

made concerning the assertion and thereafter determined "a satisfactory showing [was] made that the issuance of [a] preliminary injunction will not deprive Baja California of needed drinking water . . ." (26a-27a.) A preliminary injunction was thereafter issued. (*Id.*)

Following trial, the superior court entered judgment enjoining McDougal, "his heirs, successors, assigns, agents, servants, and employees and all persons acting in concert with or for him, from conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972". (28a.) Findings of fact and conclusions of law were adopted by the trial court. (56a-63a.)

Testimony received in opposition to Simpson's original application was referred to in the findings. (58a.) The findings noted one resident "argued against allowing an intensive operation on the premises such as was occurring some eight miles to the north at Ocotillo where a well owner was selling large quantities of water to distributors who hauled water from the well site to Baja California, Mexico". (*Id.*; also see reference to the Ocotillo well in the declaration of Munoz at 64a.)

In granting the injunction, the trial court rejected McDougal's argument the export restriction in his use permit was invalid. The court found "[t]he condition imposed in Simpson's 1967 permit was not intended to directly burden or interfere with the international commerce. Any effect on international commerce, caused by the . . . permit restriction . . ., would be merely incidental to a valid exercise of police power designed to regulate local land uses in the interest of general welfare". (62a.)

The California Supreme Court thereafter agreed to hear McDougal's appeal. In proceedings before the State Su

preme Court, Munoz was permitted to file an *amicus curiae* brief. (67a-78a.) Munoz also filed a response to the *amicus* brief filed on behalf of the county by the State Water Resources Control Board and San Francisco Bay Conservation and Development Commission (79a-84a); and, his counsel joined McDougal in orally arguing before the California Supreme Court.

The State Supreme Court partially affirmed the trial court judgment by holding McDougal bound by the export restriction in the use permit and estopped from challenging its validity. (C 6-9.)[4] The estoppel against McDougal resulted from a showing the out-of-county sale prohibition was not challenged by Simpson and his request to export water to Mexico was voluntarily withdrawn from the permit application. (C 6.) Due to the estoppel, the court concluded it was unnecessary to determine whether the export restriction was violative of the Commerce Clause, as urged by McDougal. (C 6, fn. 3.)

McDougal filed a petition for rehearing and for stay pending results of his petition for certiorari to this Court. (85a-93a.) The State Supreme Court denied the petition. (C 11.)

Thereafter, McDougal appealed to this Court and also applied for stay and supersedeas. The application was denied on October 17, 1977. (*Donald C. McDougal v. County of Imperial*, 434 U.S. 899, 54 L. Ed. 2d 187, 98 S. Ct. 294.) The appeal was dismissed for want of a substantial federal question on November 14, 1977. (434 U.S. 944, 54 L. Ed. 2d 306, 98 S. Ct. 469.)

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[4]The California Supreme Court reversed the trial court's judgment to the extent it determined McDougal violated the 1970 zoning ordinance by allowing large numbers of trucks to haul water from the well and enjoined him from operating his business in this manner. (C 9.)

Subsequent Federal Court Proceedings.

Respondents Munoz, Martinez and de Leon reside in Mexico and desire to purchase water from McDougal for export to Mexico.[5] In July, 1977, they filed an action in the United States District Court for the Southern District of California ("district court") seeking to enjoin the county, certain of its officers, and the superior court from enforcing the export restriction in McDougal's use permit. (1a-25a.)

Respondents asserted the export restriction violated the Commerce Clause and argued the state courts erred in the *McDougal* decision. Their complaint alleged *inter alia* "[t]he action by the County of Imperial, the State Supreme Court of California and the Superior Court of the State of California . . . is in direct contradiction to and is invalid pursuant to [the Commerce Clause, Art. I, §8, cl. 3, of the United States Constitution]." (10a.)

Respondents moved the district court for a preliminary injunction and filed affidavits to support the motion. (32a-54a.) In opposition, the county argued the decision of the California Supreme Court in *McDougal* was *res judicata* and the Respondents' action was barred by the Anti-Injunction Act, contained in 28 U.S.C. §2283. (55a-93a; 94a-120a.)

A preliminary injunction was issued by the district court, in September, 1977, enjoining the county and its officers from enforcing the condition in McDougal's use permit prohibiting the sale of water for use outside the county. (B 12.) The district court concluded the Respondents were not "in privity" with McDougal and the doctrine of *res judicata*

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[5]Respondent Munoz has been McDougal's broker for sales of water in Mexico since 1972, and, under the brokerage contract, McDougal "agreed to sell water to persons referred to [McDougal's premises] by [Respondent Munoz]." (7a.)

was therefore inapplicable. (B 5.) The court further determined the action was not barred by the "Anti-Injunction Act" because it did not seek to enjoin a pending state court proceeding "but rather to restrain the enforcement of an allegedly unconstitutional ordinance". (B 2-3.)

McDougal resumed sales of water for export to Mexico upon the granting of the injunction by the district court.

The county appealed to the court of appeals and thereafter unsuccessfully sought stays in separate motions filed with the district court and court of appeals. The court of appeals finally expedited determination of the appeal after the district court indicated disposition of the appeal prior to trial was desirable.[6]

The district court's judgment was affirmed on appeal. (A 1-8.) Because the California Supreme Court did not address the constitutionality of the export restriction in McDougal's use permit, the court of appeals concluded the state court decision was not a "final judgment on the merits" and thus not *res judicata* as to Respondents' action. (A 7.) The Ninth Circuit rejected the county's claim the Respondents' action was barred by the Anti-Injunction Act by concluding there did "not remain a last act necessary to effectuate the California Supreme Court judgment". (A 5.) The court further stated "[m]oreover, even if ongoing state proceedings remained, [respondents] here, not being parties to the state suit, may mount a constitutional challenge in federal court against the law which is the subject of these

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[6]During the pendency of the federal appeal, the superior court held McDougal in contempt of court for "knowingly selling water from the well on the . . . premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico". (D 2.) McDougal was ordered to cease the selling of water as described but execution of said order was stayed pending final resolution of the federal action. (D 3.)

state proceedings''. (A 6.) Finally, the court of appeals directed that the district court should determine the validity of the use permit export restriction in light of *Hughes v. Oklahoma*, ... U.S. .... ,60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979). (A 4, fn. 1.)

SUMMARY OF ARGUMENTS.

I.

The doctrine of *res judicata* precludes Respondents' collateral attack on the judgment of the California Supreme Court. Contrary to the conclusion of the court of appeals, *McDougal* is a final judgment on the merits as to the federal cause of action.

McDougal attempted to challenge the constitutionality of the subject export restriction throughout the state court proceedings. The State Supreme Court, however, found McDougal estopped because his predecessor agreed to and abided by the restriction and benefited from issuance of the permit. The estoppel is an adequate and independent ground for the state court decision.

Uses authorized for McDougal's parcel are governed by the terms of his use permit. Any rights of Respondents with respect to the parcel are derivative of McDougal's. Since McDougal, as owner, is bound by the out-of-county sales prohibition, Respondents must also be bound. Respondents cannot logically acquire greater rights with respect to ground water underlying the parcel than possessed by McDougal.

Determination of what constitutes a "cause of action" for purposes of *res judicata* turns on whether there is such a measure of identity between actions so that a different judgment in the second action would impair or destroy the first. The federal court judgment in favor of the Respondents purports to enjoin enforcement of the very restriction upheld by the State Supreme Court. It obviously impairs rights adjudicated in favor of the county and therefore Respondents' suit should be regarded as the same cause of action as litigated in *McDougal*.

Respondents' claim of error by the superior court and State Supreme Court does not sanction their indirect attack.

Asserted error does not prevent a final judgment on the merits from being *res judicata*.

Even though Respondents were not formally parties in *McDougal*, their interests are entwined with those of McDougal and they had the opportunity to participate with him in the state court proceedings. Indeed, Respondent Munoz actually did participate in the trial court proceedings and acted as *amicus curiae* before the State Supreme Court. Respondents are thereby bound by the decision in *McDougal* as participating "non-parties".

Respondents and the "whole world" are further bound by *McDougal* because the decision of the California Supreme Court constitutes a judgment *in rem*.

II.

The Anti-Injunction Act contained in 28 U.S.C. §2283 bars Respondents' action. Conclusions of the court of appeals that McDougal has complied with the decision of the California Supreme Court, and that no further enforcement actions are pending in the state court which may be affected by the federal injunction, are inaccurate.

McDougal is required by the terms of the State Supreme Court decision to refuse water sales to Respondents for sale to Mexico. Clearly, he is not complying with the judgment.

There are further enforcement actions pending or available in the state courts which are affected by the federal injunction. The superior court's contempt proceeding against McDougal is an example of such an enforcement proceeding.

The fact the district court fashioned its injunction against the county and its officers instead of against the state courts does not make the injunction any less violative of the Anti-Injunction Act. The Act is not avoided by framing the injunction against the parties rather than against the court.

Reliance by the district court and court of appeals on *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938) is inapposite. There a third party stranger separately affected by a statute was permitted to bring a federal action to challenge the law although earlier state court proceeding had upheld the constitutionality of enactment.

In the present case, the Respondents are not strangers. They are instead contractors of McDougal. Respondents' interests are closely aligned with those of McDougal and legality of their agreements with McDougal depended on the decision in *McDougal*. Respondents had the opportunity to participate with McDougal in the state court proceedings; and, indeed Munoz did participate.

The present case involves no statute or ordinance of county-wide application under which Respondents' rights to engage in international commerce are affected. Instead, Respondents' action attacks the restriction in a specific use permit affecting a single parcel of land. As shown, the same restriction was ruled enforceable by the State Supreme Court and is the subject of enforcement proceedings by the superior court.

The case of *Vendo Co. v. Lektro-Vend Corporation*, 433 U.S. 623 (1977), wherein the Court reversed a district court injunction against enforcement of a final state supreme court judgment, should require reversal here.

III.

Direction by the court of appeals for the district court to determine the constitutionality of the subject export restriction in light of *Hughes v. Oklahoma*, ... U.S. .... , 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979) is erroneous. *Hughes* is clearly distinguishable.

Appellant Hughes was convicted in the state court for violation of an Oklahoma statute which prohibited export

outside the state of natural minnows procured from state waters. After the state appeals court affirmed, Hughes successfully appealed to this Court.

Hughes thus succeeded in his direct attack on the state court judgment. McDougal did not. McDougal's appeal to this Court was dismissed for want of a substantial federal question; and, the decision of the California Supreme Court is therefore a final judgment on the merits.

As argued above, the *McDougal* decision is *res judicata* as to Respondents' action and their suit is further barred by the Anti-Injunction Act. Neither of these issues were present in *Hughes*.

Respondents should not be allowed to relitigate whether the subject export restriction is enforceable. Assuming *arguendo* they somehow do have standing to challenge the restriction in McDougal's use permit, it is not clear *Hughes* should control.

This Court has recognized the right of a state, under its police power to prevent waters from non-navigable streams from being diverted outside the state in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

The district court attempted to distinguish *Hudson County Water Co.* on grounds it involved river water and riparian type rights not applicable to McDougal. The court relied on *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex., 1966), *aff'd.*, 385 U.S. 35 (1966).

City of Altus, Oklahoma should not be controlled because of the peculiar "rule of capture" applied to ground water in Texas. California courts long ago announced a "doctrine of correlative right" applying to percolating ground waters. (*Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766 (1903).)

The aforesaid correlative rights doctrine is similar to riparian rights rules applicable to certain streams and rivers. Thus, analogizing from *Hudson County Water Co. v. McCarter*, the county may be empowered to prevent exportation of ground water.

ARGUMENT.

I.

The Decision of the California Supreme Court in the McDougal Case Is Res Judicata as to Respondents' Action.

The California Supreme Court held McDougal estopped from challenging the export restriction in his use permit based on facts showing his predecessor agreed to and abided by the condition, and or benefited from issuance of the permit. (*County of Imperial v. Donald C. McDougal* (*supra*) C 6.) The Court ruled:

> ". . . [A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (*Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 650 [255 P. 2d 772, 777]; *Zweifel Manufacturing Corp. v. City of Peoria* (Ill. 1957) 144 N.E. 2d 593, 595; *Psyhogios v. Village of Skokie* (Ill. App. 1972) 280 N.E. 2d 552, 556; *Skipjack Cove Marina, Inc. v. County Commissioners* (Md. 1969) 250 A. 2d 260, 265-267; *Stevenson v. Palmer* (Tenn. 1969) 448 S.W. 2d 67, 69; cf. *Naper Areo Club v. County of DuPage* (Ill. 1964) 197 N.Ed. 2d 1.) Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, *and he is bound by the limitation*". (C 6, with emphasis added.)

Due to the estoppel, the State Supreme Court determined it was not necessary to determine whether the prohibition against the export of water was valid. (C 6, fn. 3.) In making

such a determination, the Court rejected McDougal's assertion civil rights authorities applied.[7]

In the subsequent federal litigation, the court of appeals concluded the California Supreme Court decision was not a "final judgment on the merits" so as to be *res judicata* as to Respondents' action. (A 7-8.) Specifically, the federal court stated:

> "A review of the California Supreme Court decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by the court. (citation omitted.) There is thus no valid final judgment on the merits existing as to the cause of action in the instant case. As a result, the California Supreme Court decision would not have a *res judicata* effect in a case where proper parties, including even those in privity with McDougal, are directly challenging the permit's validity on constitutional grounds. Since the doctrine of *res judicata* extends only to issues that have been litigated on the merits, see *Smith v. Lujan*, 588 F. 2d 1304, 1307 (9th Cir., 1979); *Hooker v. Klein*, 573 F. 2d at 1357, it is not applicable in this case". (A 7-8.)

The reasoning of the court of appeals is fallacious.

Enforceability of the use permit export restriction *was* a central issue in the *McDougal* litigation. McDougal attempted to challenge the constitutionality of the restriction throughout the state court proceedings. (61a-63a.) As *amicus curiae*, Respondent Munoz also asserted in the state

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[7]The State Supreme Court found *Shelley v. Kramer*, 334 U.S. 1 (1947) "inapposite" and observed "*Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate". (C 6, fn. 3.)

proceedings that the condition was violative of the Commerce Clause. (67a-86a.)

A final judgment on the merits for purposes of application of the doctrine of *res judicata* is one based on legal rights as distinguished from mere matters of practice, procedure, or form. (1B Moore's Federal Practice, *Res Judicata*, §0.409, citing *Swift v. McPherson*, 232 U.S. 51 (1914); *Clegg v. United States*, 112 F. 2d 886, 887 (CCA 10th, 1940) and other authorities.)

Estoppel *is* a valid and substantive ground for a state court decision.[8] the California Supreme Court's decision is

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[8]Estoppel was found by this Court to be an adequate and independent ground for state court decision in *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1919). In *Enterprise*, the court refused to disturb a decision of the Nebraska Supreme court based on estoppel and dealing with the relative rights of parties to divert river water for irrigation. The court stated:

> "As has been shown, several questions were presented to the supreme court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a Federal question and the other as plainly non-Federal . . . In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it (citations omitted).
>
> "It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment." (243 U.S. 157, 163-165.)

Estoppel was also found to be an adequate and independent state ground in all of the following cases: *Pierce v. Somerset Railway*, 171 U.S. 641 (1898); *Lowry v. Silver City Gold and Silver Mining Co.*, 179 U.S. 196 (1900); *Utley v. City of St. Petersburg*, 292 U.S. 106, 111-112 (1933); *Beals v. Cone*, 188 U.S. 184, 196 (1903); *Hale v. Lewis*, 181 U.S. 473, 479-480 (1901); *Gillis v. Stinchfield*, 159 U.S. 658 (1895); *Michigan v. Flint*, 152 U.S. 363, 368 (1894); *Israel v. Arthur*, 152 U.S. 355, 362 (1894); *Sherman v. Grinnell*, 144 U.S. 198, 202 (1892); *Marrow v. Brinkley*, 129 U.S. 178, 181 (1888); *Adams Co. v. Burlington and Mo. River Railroad Co.*, 112 U.S. 123, 127-129 (1884). In *Mobile, Jackson and Kansas City R. Co. v. Mississippi*, 210 U.S. 187, 204 (1907) and *Rutland Railroad Co. v. Central Vermont Railroad Co.*, 159 U.S. 630, 640 (1895), this Court rejected appeals on said grounds even though interference with interstate commerce was alleged.

clearly a "final judgment on the merits" as to McDougal's rights under the use permit.

The decision holding McDougal cannot sell water from his premises for export must also logically prevent Respondents from purchasing water from McDougal for distribution in Mexico.

As shown, the right to use the subject parcel for commercial purposes depended on issuance of a conditional use permit. (C 1-2.) A conditional use permit is a special permit authorized under local zoning. (C 5, citing 3 Anderson, American Law of Zoning (2d ed., 1977), page 359.) Such a permit runs with the land (C 5, citing *Cohn v. County Board of Supervisors* (1955) 135 Cal. App. 2d 180, 184, 286 P. 2d 836, 839); and, by purchasing the parcel, McDougal succeeded to benefits enjoyed by Simpson under his permit. (C 5.) It is equally clear, however, McDougal became subject to the permit limitation and could assert no greater rights than possessed by Simpson. (*Id.*)

Respondents have been issued no use permit pertaining to the subject parcel. Any rights they have with regard to the parcel must be derivative of McDougal's. Since McDougal is bound by the export restriction, Respondents must necessarily be bound. Respondents cannot logically acquire greater rights than the owner of the land.

Various tests have been suggested for determination of what constitutes a "cause of action" for purposes of *res judicata*. They include ". . . whether 'there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first judgment' ". (1B Moore's Federal Practice, *Res Judicata*, §0.410.)

The present federal injunction purports to enjoin enforcement of the same restriction upheld by the California Su-

preme Court. It therefore obviously "destroys or impairs" rights earlier adjudicated in favor of the county. Under the rule announced, Respondents' suit must be regarded as the same cause of action as adjudicated in *McDougal*. "The purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had reasonable opportunity to litigate. A reading of the early cases as compared with recent ones makes it clear that the meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier. . . . " (*Williamson v. Columbia Gas and Electric Co.*, 186 F. 2d 464, 469-470 (5th Cir., 1950), cert. den., 341 U.S. 911 (1951); also see *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 109 F. 2d 623, 627 (5th Cir., 1940), cert. den., 310 U.S. 653 (1940).)

McDougal had full opportunity to litigate the constitutionality of the subject export restriction in the state courts. Respondent Munoz actually participated in the state court proceedings. As seen, the California Supreme Court rejected their constitutional challenge and this Court dismissed McDougal's appeal. The decision in *McDougal* is therefore on the merits as to the Respondents' "cause of action".[9]

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[9]Authorities relied on by the court of appeals, including *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1954,) *Smith v. Lujan*, 588 F. 2d 1304 (9th Cir., 1979) and *Hooker v. Klein*, 573 F. 2d 1360 (9th Cir., 1976) (A 7-8) are not on point.

This Court in *Lawlor* ruled a prior consent judgment of dismissal with prejudice in a private anti-trust action did not bar a similar action based on subsequent acts of the defendant, since the subsequent wrong involved a new cause of action. (349 U.S. 326-330.) In *Smith*, the court of appeals concluded an earlier order of the Island Court did not bar a subsequent action in the district court for reexecution of a lease because the earlier order ". . . determined only that the court was without jurisdiction to order the [appellant's predecessor] to execute the . . . lease". (588 F. 2d 1307.) And, *Hooker* holds dismissal of a first extradition complaint is not *res judicata* as to a subsequent request. The court concluded a finding of extradition "is truly an interlocutory order, more akin to a preliminary hearing on criminal charges". (573 F. 2d 1367.)

Respondents' complaint asserts the decisions of the superior court and the California Supreme Court in *McDougal* are in error. (10a.) It is clear, however, claimed error does not sanction collateral attack. "If whenever a judgment were called in question, the court in this proceeding could review the matter previously adjudged to determine whether there had been error, a judgment would have no finality; immortal litigation would overcome mortal man; and the sound principle of fundamental repose, which underlies res judicata, would be subverted." (IB Moore's Federal Practice, *Res Judicata* §0.405 [4-1].)

Concededly, Respondents were not formal parties to the *McDougal* litigation.[10] It is submitted, however, they are bound as "non-parties" by the decision of the California Supreme Court under one or more of the theories advanced below.

Non-party participants are often bound by the outcome of litigation. As stated by Professor Moore, the rule is:

> "If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and has adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the doctrine of judicial finality require that the participating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action . . ." (IB Moore's Federal Practice, §0.411 [6].)

The principle of binding non-party participants to the outcome of litigation was upheld in a land title case by this Court in *Souffront v. La Compagnie des Sucreries de Porto*

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[10]The court of appeals did not, however, hinge its decision on any absence of "privity" as did the district court. (Compare B 5 with A 7-8.)

Rico, 217 U.S. 475, 487 (1909). The Court has recognized that identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be in legal effect the same. (*Chicago R.I. and Pac. R. Co. v. Schendel*, 270 U.S. 611 (1925); also see *Schnell v. Eckrich and Sons*, 365 U.S. 260 (1961).)

Recently, the Fifth Circuit Court of Appeals thoroughly discussed these principles in *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F. 2d 84 (1977)[11] The court stated "'. . . federal courts have repeatedly held that judgments can bind persons not party to the litigation in question. (citing cases.) At common law this preclusive effect extended only to those in privity with the parties. (citation omitted.) But federal cases have recognized that 'privity' denotes a legal conclusion rather than a judgmental process. Professor Vestal has explained:

> " 'Thus, the term privity in itself does not state a reason for either including or excluding a person from the binding effect of a prior judgment, but rather it represents a legal conclusion that the relationships between one who is a party on the record and the nonparty is sufficient to afford application of the principle of preclusion.' " (546 F. 2d 95 citing Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27 (1964).)

Respondent Munoz is and has been McDougal's "broker" for the sale of water in Mexico. (7a.) Under terms of

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[11]In *Southwest Airlines Co.*, the court of appeals affirmed an injunction in favor of Southwest Airlines Co. enjoining the appellant CAB certified airlines from proceeding in the state court to challenge Southwest's right to provide service at Love Field, as acquired in an earlier federal court proceeding. (546 F. 2d 87, 88.) The court ruled the appellants were bound by the federal decision although they were not parties primarily on the rationale their interests were adequately represented by the City of Dallas, the plaintiff in the original federal suit. (546 F. 2d 97-102.)

the brokerage contract with Munoz, McDougal is required to sell water for export to persons (presumably including Respondents Martinez and de Leon) referred to McDougal's premises by Munoz. (*Id.*)

A close proprietary relationship has existed between the Respondents and McDougal. Obviously, they shared an interest in the outcome of the *McDougal* litigation since the enforceability of the export restriction and, indirectly, the legality of their agreements, was at stake.

Respondents had the opportunity to participate in the state court proceedings and Respondent Munoz actually did so participate with McDougal. (64a-66a.) Munoz also acted as *amicus curiae* before the State Supreme Court and his attorney argued on the side of McDougal before said Court. (67a-84a.)

Respondents should therefore be bound by the decision in *McDougal* under the above referenced rules as participating "non-parties".

Disregarding the aforesaid common interests and participation involving Respondents and McDougal, the Respondents, and indeed the "whole world", should be bound by the *McDougal* decision. This follows because the decision of the California Supreme Court can be said to be a judgment "in rem". (See 47 Am. Jur. 2d, Judgments §§1057 and 1071 for the propositions that a judgment *in rem* is one which is pronounced upon the status of some particular subject matter or rendered in a proceeding instituted against property and that such a judgment is binding "on third persons, or on all parties in interest, or as it is frequently said, on the whole world".)

Although there appears to be a dearth of authority precisely on point, *People v. Gifford*, 54 Cal. App. 182, 201 P. 469 (1921) held that a proceeding (under the Red Light

Abatement Act) to abate a nuisance consisting of the maintenance and use of property in violation of law is a proceeding *in rem* primarily against property.[12] It is submitted the state court proceedings in *McDougal* are analogous.

The county's action charged McDougal was using his land in violation of zoning and in a manner which constituted a public nuisance. The State Supreme Court held, in effect, McDougal was using his parcel in violation of the terms of his use permit, by which he was bound. Thus, the judgment is *in rem* and binding on all.

II.

The Federal Injunction Against Enforcement of the Export Restriction Upheld by the California Supreme Court Violates the Anti-Injunction Act.

The "Anti-Injunction Act", 28 U.S.C. §2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Quoting from *Hill v. Martin*, 296 U.S. 393 (1935), the court of appeals recognized:

> "The prohibition of §265 [the predecessor to the present 28 U.S.C. §2283] is against a stay of 'proceedings in any court of a State'. That term is comprehensive. It includes all steps taken or which may

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[12] *Gifford* (*supra*) involved a public nuisance proceeding for abatement of a public nuisance consisting of a building used for prostitution. The action was dismissed as to the occupant of the building and the owner thereafter argued the plaintiff lost the right to further prosecute the action. The court of appeal rejected the argument stating ". . . it is well to remember that the principal purpose of the action is to abate and prevent a nuisance, it being a proceeding *in rem*, primarily against the property because it is maintained and used in violation of the law." (54 Cal. App. 183, 201 P. 470.)

> be taken in the state court or by its officers from the institution to the close of the final process. . . . It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. 296 U.S. at 403. (footnotes omitted.)'' (A 5.)

The court also referred in its opinion to the decision of this Court in *Vendo Co. v. Lektro-Vend Corporation*, 433 U.S. 623 (1977), wherein the Anti-Injunction Act was applied to prevent a federal court from enjoining a state court proceeding. (A 5.)

However, the court of appeals concluded ''. . . there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal*. McDougal has complied with the California Supreme Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County. No further proceedings or enforcement provisions of the California Supreme Court remain which may be affected by the district court injunction''. (A 5-6.)

The aforesaid conclusions are obviously erroneous.

Compliance with the judgment of the California Supreme Court requires that McDougal *not* sell water from his premises to the Respondents for export. Commencing with issuance of the district court's injunction, McDougal has openly sold water for export to Mexico in violation of the judgment.

There *are* proceedings which remain open to the state court to enforce the *McDougal* judgment. The superior court's contempt judgment against McDougal is the result of such an enforcement proceeding. (D 1-2.) As a gesture

of comity, said court has withheld execution pending final determination of these federal proceedings. (D 3-4.)

The recent decision of this Court in *Vendo Co. v. Lektro-Vend Corporation*, 433 U.S. 623 (1977) is controlling and requires reversal of the district court's injunction.

In *Vendo*, after nine years of litigation in the Illinois courts, the Supreme Court of Illinois affirmed a money judgment in favor of Vendo Company. Shortly thereafter, Lektro-Vend Corporation petitioned the U.S. District Court to enjoin state proceedings to collect the judgment. The district court granted that request and the court of appeals affirmed.

This Court reversed, finding that the injunction was barred by the Anti-Injunction Act. Specifically, the Court determined the Clayton Act did not authorize the federal injunction under the "expressly authorized" exception to §2283.

In the course of its opinion, the Court emphasized the inflexible nature of the Act stating that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy". (433 U.S. 630.) The Court also addressed the argument the injunction was necessary in aid of the district court's jurisdiction and rejected it stating "[n]o case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception". (433 U.S. 623, 630.)

The Court referred in *Vendo* to the Anti-Injunction Act as an "absolute prohibition against any injunction of any state-court proceedings; unless the injunction falls within one of the three specifically defined exceptions in the Act". (433 U.S. 630.) The Court stated flatly "[it is] clear beyond

cavil that the prohibition is not to be whittled away by judicial improvisation''. (433 U.S. 630 citing *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 514 (1944).)[13]

Respondents' action sought to enjoin the superior court in addition to the county from enforcing the restriction in McDougal's use permit. (22a.) The district court, however, directed its injunction only against the county, its officers and agents. (B 12.)

Authorities have consistently held, however, that a restraint against the parties rather than against the court itself does not make the action any less a violation of the Anti-Injunction Act. Beginning with *Union Central Life Ins. Co. v. McAden, et al.*, 21 F. Supp. 110 (N.D. Tex. 1937), federal courts have criticized this technique. In *H. J. Heinz Co. v. Owens*, 189 F. 2d 505 (9th Cir., 1951), the court of appeals denied a motion for an injunction stating ''[t]his statutory prohibition is not avoided by framing an injunction as a restraint on a party rather than directly against the state court itself.'' (Also see *Furnish v. Board of Medical Examiners*, 257 F. 2d 520 (9th Cir., 1958).)

The present court of appeals also said ''[m]oreover, even if ongoing state proceedings remain, [respondents] here, not being parties in the state suit, may mount a constitutional challenge in federal court against *the law* which is the subject

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[13]Additional cases holding that provisions of the Anti-Injunction Act are to be strictly construed are legion. (See *Mitchum v. Foster*, 407 U.S. 225 (1972); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970); *International Association of Machinists and Aerospace Workers v. Nix*, 512 F. 2d 125 (5th Cir., 1975); *Carter v. Ogden Corp.*, 524 F. 2d 74 (5th Cir., 1975); *Baine v. City of Danville*, 337 F. 2d 579 (4th Cir., 1964).)

of these state proceedings." (A 6, with emphasis added, citing *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938).)[14]

Said statement badly misapprehends facts and law.

In *Hale v. Bimco Trading, Inc.* (*supra*), action was brought in the Florida Supreme Court to compel state officials to enforce a statute requiring inspection and fees for imported cement. (306 U.S. 377.) Initially, the Florida court overruled a demurrer challenging the constitutionality of the statute. (*Id.*) However, prior to entry of final judgment by the state court, Appellee Bimco Trading, Inc., a stranger to the state proceedings, commenced a separate action in the federal court to enjoin enforcement of the statute. The district court issued an interlocutory injunction restraining enforcement of the statute. (306 U.S. 377.)

On application by the state officials, the Florida Supreme Court agreed to stay all further proceedings ". . . until the final decision of the Supreme Court of the United States . . ." (*Id.*) This Court thereafter affirmed the lower federal court's injunction against enforcement of the statute. (306 U.S. 380.)

In sharp contrast to *Hale*, the California Supreme Court in *McDougal* finally adjudicated the enforceability of the subject export restriction, and this Court dismissed McDougal's appeal, *before* any action was commenced in the district court.

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[14]The district court likewise concluded the Anti-Injunction Act did not have application because ". . . what is really being sought in this lawsuit is not to enjoin a pending state court proceeding but rather to restrain the enforcement of an allegedly *unconstitutional ordinance*. It seems obvious that this court may, if otherwise appropriate, restrain the operation of an *unconstitutional statute*; surely it does not lose the right to do so merely because the *statute* has been tested in the state courts." (B 2-3, with emphasis added; also citing *Hale v. Bimco Trading Co., supra.*)

The party who brought the federal court challenge in *Hale* was a third party stranger to the state court proceedings. The present Respondents are *not* strangers but purchasers of water from McDougal. Respondent Munoz, McDougal's broker for sale of water in Mexico, participated in the state trial court proceedings and as *amicus curiae* before the California Supreme Court.

The court of appeals and district court relied on *Hale v. Bimco Trading, Inc.* for the proposition third parties may challenge a *statute* or *ordinance* in the federal court even though the enactment has been upheld in an earlier proceeding by a state court. (A 6; B 2-3.) The courts thus recognize third parties who are separately affected by a statute or ordinance may mount a federal challenge even though others have been unsuccessful in prior state court proceedings.

However, the present case does *not* involve a countywide ordinance which, for example, prevents Respondents from exporting ground water outside the county.[15] The federal courts have mischaracterized Respondents' action. Instead of contesting an ordinance or statute, Respondents' action is directed at the export restriction in McDougal's use permit affecting a single parcel.

The factual similarity between *Vendo Co. v. Lektro-Vend Corporation (supra)* and the present case is strong. After five years of litigation in the California courts, the State Supreme Court affirmed the trial court's judgment insofar as it upholds the enforceability of the export restriction in McDougal's permit. Respondents, like the petitioners in

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[15]It is apparent the county has no such ordinance since ground water is currently exported to Mexico from another well in the county located at Ocotillo. (See declaration of Munoz at 64a and trial court findings at 58a.)

Vendo, seek in effect to enjoin enforcement of the final judgment of the State Supreme Court. This Court reversed such an injunction in *Vendo* and should likewise do so here.

III.

Direction by the Court of Appeals for the District Court to Rely on Hughes v. Oklahoma Is Erroneous.

The court of appeals directed that the district court's decision ". . . regarding the merits of the Commerce Clause question should be made in light of *Hughes v. Oklahoma* [.... U.S. .... , 60 L. Ed. 2d 250, 99 S.Ct. 1727 (1979).]" (A 4, fn. 1.) In *Hughes*, this Court found an Oklahoma statute violative of the Commerce Clause which prohibited the export outside of the state of minnows procured from state waters.[16]

Hughes case is distinguishable from the present case and the direction by the court of appeals is inapposite.

After the Oklahoma Court of Criminal Appeals affirmed his conviction, Appellant Hughes successfully appealed to this Court. In contrast, McDougal's attempted direct attack on the California Supreme Court decision failed. This Court dismissed McDougal's appeal for want of a substantial federal question. (434 U.S. 944.)

As shown, Respondents have launched a collateral attack on the State Supreme Court's judgment and their action should be barred by the doctrine of *res judicata* and the Anti-Injunction Act. *Hughes* (*supra*) involved neither of these issues.

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[16]By *Hughes*, this Court overruled *Geer v. Connecticut*, 161 U.S. 519 (1893) which had upheld a statute forbidding the transportation beyond the state of game birds that had been lawfully killed within the state. (60 L. Ed. 2d 255.) The court thereby overturned earlier precedent that a state "owned" wildlife within its boundaries and could therefore prevent the "property" from being removed. (60 L. Ed. 2d 256, 257, 260, 261.)

Hughes v. Oklahoma, like *Hale v. Bimco Trading, Inc.* (*supra*), involved a statute with state-wide application. As discussed above, the present case does not involve any statute or ordinance of general application. The export restriction at issue, as ruled enforceable by the State Supreme Court, affects only a single parcel.

Because the California Supreme Court ruled the restriction in McDougal's use permit enforceable, the federal courts should be precluded from adjudicating any "Commerce Clause question". Assuming *arguendo* Respondents have standing, it is not clear *Hughes v. Oklahoma* should control. This is because the Court has recognized that a state may by exercise of its police power prevent waters from a stream within its boundaries from being diverted outside the state. (*Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).)

In *Hudson County Water Co. v. McCarter*, (*supra*), the defendant contracted to divert water from the Passaic River, a non-navigable stream in New Jersey, to the City of New York. However, the State of New Jersey enacted a statute providing:

> "[I]t shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." (209 U.S. 353.)

The State sued to enjoin the intended diversion of water and the defendant contended the enactment was unconstitutional for, among other reasons, impairment of contract and interference with commerce between New Jersey and New York. (209 U.S. 354.) The state appellate court upheld the statute mainly upon the rationale the defendant was a riparian owner with "no right to divert water for more than reasonable distance from the body of the stream or for other

than the well-known ordinary uses, . . .'' (*Id.*) A ''residuum of public ownership [of the stream] in the state'' was also ''infer[red]'' by the state court''. (*Id.*)

While not disagreeing with the state court's rationale, Justice Oliver Wendell Holmes, who wrote the court's opinion, said:

> ''. . . [W]e prefer to put the authority, which cannot be denied to the state, upon a broader ground . . ., since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.
>
> * * * *
>
> ''The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city without compensation. To that extent it cuts down what otherwise would be the rights of property.
>
> * * * *
>
> ''It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of land most immediately concerned. (citations omitted.) What it may protect by suit in this court from the interference in the name of

property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within . . .

* * * *

". . ., [I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

"We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat

> rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it may keep and give no one reason for its will." (*Hudson County Water Co. v. McCarter* (*supra*) at pages 355-357.)

The district court purported to distinguish *Hudson County Water Co. v. McCarter* by finding "[r]iver water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well". (B 9.)[17] The court relied instead on *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966), wherein a Texas statute was declared unconstitutional which forbade "drilling a well in Texas and transporting the water outside the State, . . ." (B 8.)

City of Altus, Oklahoma (*supra*) should not, however, be regarded as controlling because the decision turns on provisions of Texas law not here applicable. As will be discussed, California ground water law limits rights of overlying owners in a fashion analogous to those of the "riparian owner" in *Hudson County Water Co. v. McCarter* (*supra*).

In Texas, a landowner has an absolute right to drill wells and to appropriate "captured" underground water. *City of Altus, Oklahoma v. Carr* (*supra*) at 833. The Texas "rule of capture", discussed in *City of Corpus Christi v. City of*

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[17]The court of appeals opinion did not address *Hudson County Water Co. v. McCarter* (*supra*) but instead simply directed the district court to decide the "Commerce Clause question" in accordance with *Hughes v. Oklahoma*. (A 1-8.)

Pleasanton, 154 Tex. 289, 279 S.W. 2d 798 (1955), gives an overlying owner the authority to extract water and to even deplete the basin and requires that injury thereby occurring to neighbors "falls within the description of damnum absque injuria, which cannot be the ground of an action". (255 F. Supp. 840.)

Emphasizing the aforesaid Texas law, the district court in *City of Altus, Oklahoma v. Carr* rejected application of *Hudson County Water Co. v. McCarter* (*supra*); and, instead, relied on natural gas cases in finding the subject enactment violative of the Commerce Clause. (255 F. Supp. 839, 840.) California, however, has a much different set of rules governing use of percolating ground waters, as here involved.[18]

The use of percolating ground waters in California is governed by a "doctrine of correlative rights" which gives each overlying owner a common right to reasonable beneficial use of the water on the overlying land, along with similar rights of all other landowners overlying the same ground water supply. (*Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766 (1903); also see *Pasadena v. Alhambra*, 33 Cal. 2d 908, 926, 207 P. 2d 17, 29 (1949).)

Correlative rights are limited to reasonable beneficial uses. *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 529-530, 45 P. 2d 972, 988-989 (1935).[19]

---

[18]The nature of the Ocotillo-Coyote Wells Basin, in which McDougal's property is located, is described in a report prepared in November, 1977 by the United States Geological Survey entitled "Digital-Model Evaluation of the Ground-Water Resources in the Ocotillo-Coyote Wells, Imperial County, California". The report was attached as Exhibit "B" to points and authorities supporting the county's second motion for stay of preliminary injunction filed with the district court on June 28, 1978 and is a part of the clerk's record on appeal.

[19]Article X, §2 of the California Constitution requires, in part, that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable, . . ."

Reasonable use on lands overlying the water has preference over diversion of water for use on other lands. (*Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 584-585, 77 P. 1113, 1114-1115 (1904).) Only surplus waters are appropriable. (*San Bernardino v. Riverside*, 186 Cal. 7, 20, 198 P. 784, 790 (1921).)

In many respects, the correlative right in California is similar to a riparian right to riparian streams. (*Burr v. Maclay Rancho Water Co.*, 154 Cal. 428, 436, 98 P. 260, 264 (1908); *O'Leary v. Herbert*, 5 Cal. 2d 416, 422, 55 P. 2d 834, 838 (1936).) Contrary to the view of the district court, McDougal's rights *are* therefore limited under California law in a manner akin to the riparian right referred to in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 354.

As argued above, the federal courts do not have jurisdiction to readjudicate the export restriction in McDougal's use permit. If jurisdiction somehow exists, *Hudson County Water Co. v. McCarter* provides a further basis for upholding the restriction on the merits.

CONCLUSION.

The judgment of the court of appeals affirming the injunction granted by the district court should be reversed.

Respectfully submitted,

JAMES H. HARMON,
County Counsel County of Imperial,
Attorney for the Petitioners.

Supreme Court, U. S.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS.

WILLIAM H. KRONBERGER, JR.,
MURRY LUFTIG,
1007 Fifth Avenue, Suite 1100,
San Diego, Calif. 92101,
(714) 231-8491,
Counsel for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents.

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BRIEF FOR THE RESPONDENTS.

STATEMENT OF THE CASE.

A. The July 15, 1977 Refusal to Sell.

On July 15, 1977, two citizens of the Republic of Mexico residing in Mexicali, Baja, California del Norte, travelled to the McDougal Wells, Imperial County, California to purchase water. (38a; 43a) Humberto Martinez and Juan DeLeon are both businessmen who engage in the purchase of water in Imperial County which they then transport across the border for bottling and resale to the citizens and visitors of the Mexicali metropolitan district (37a; 43a), a community where safe and sanitary water is in extremely short supply (39a). The main single source of potable drinking

water for the City of Mexicali was the Clifford Well, County of Imperial, California, where the price of water was $1.40 per thousand gallons, (34a) contrasted with McDougal Wells where the price was 40¢ per thousand gallons less (34a). The McDougal well is also eight miles closer to the International border (34a; 40a).

Mr. Martinez, drove to McDougal wells on July 15, 1977 to purchase the less expensive water which would at the same time increase his number of daily trips, decrease his operating costs (38a) and end his dependence on the unreliable Clifford Well (41a). Upon his arrival defendant McDougal asked him where he lived; he responded Mexicali. Mr. McDougal advised him that since the water was intended for Mexico, he would not sell it to him. McDougal's refusal caused Martinez "economic loss and grief inasmuch as . . . [he] . . . could pass this 40% savings in raw material costs to the citizens of Mexicali, who are in dire need of a safe and sanitary drinking water source." (38a)[1]

Juan DeLeon likewise journeyed to McDougal wells where water was advertised for sale to the general public (43a). Upon his arrival he noticed a sign in both English and Spanish stating water would not be sold for use outside of the County (44a; Clerk's Record on Appeal, P.68-76, Exhibit A). Mr. DeLeon attempted to purchase water from McDougal who inquired where he lived. DeLeon responded that it wasn't any of McDougal's business, that he was simply a member of the general public seeking to purchase water. Mr. DeLeon was then given a declaration (30a-31a) and asked to swear under penalty of perjury that the water

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[1]See also, Declaration of Hugo Hernandez Teran, ENG, Regional Director, B.CFA., Department of Health and Public Assistance, Republic of Mexico (52a-54a)

was not for use outside of Imperial County. DeLeon refused to sign and McDougal refused to sell. (44a)

The third plaintiff, Guillermo Gallego Munoz, like his compatriots, met the same refusal to sell water, the only difference being that he had entered into an agreement with McDougal in June of 1972 to act as his broker in Mexico (32a).

The activities of July 15, 1977 resulted in the present litigation.

B. The Genesis of the Refusal to Sell: County of Imperial v. McDougal.

McDougal's refusal to sell to Martinez, Munoz and DeLeon was based on litigation brought by the County of Imperial several years earlier to prevent the continuation of an intensive trucking operation and the exportation of water without a conditional use permit which the County claimed was required by its zoning ordinance. That litigation culminated in *County of Imperial v. McDougal*, 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14 (1977).[2]

In November of 1972, respondent Munoz signed a declaration which defendant McDougal annexed to his answer in the state court proceedings. Munoz in 1972 declared, among other things, that it "was absolutely essential that the City of Mexicali and the City of San Felipe receive water from the Ocotillo basin since that was the only good drinking water within a reasonable distance." (64a-66a) Four years later, in September of 1975, he appeared as *amicus curiae* before the California Supreme Court (67a-84a).

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[2]The opinion of the California Supreme Court in *County of Imperial v. McDougal*, is set forth in the Petition for Certiorari as Appendix "C" (C1-11) Citations hereafter will be to Appendix C.

The state trial court found that McDougal's 1967 conditional use permit restricted sales of water for use only in the County so that intensive land usage, incompatible with surrounding land uses, would be avoided (61a). This finding was *reversed* by the California Supreme Court which found that the evidence was insufficient to support such a finding and that the 1967 restriction was "intended to accomplish only what it clearly states, *i.e.*, a prohibition against exporting water from the County." (C-9)

The trial court also concluded that McDougal's trucking operations were in violation of the County's zoning ordinance requiring a conditional use permit which McDougal did not possess (61a). This judgment was also *reversed* by the California Supreme Court. (C-9)

McDougal, at both the trial and appellate level, asserted the 1967 restriction against export constituted an invalid interference with interstate and foreign commerce. The California Supreme Court refused to consider the question of the restriction's constitutional invalidity since, under state law, ". . . a land owner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." (C-6) McDougal was therefore estopped to assert the restrictions invalidity. The court observed at Footnote 3 of its opinion:

> "In view of this conclusion, we need not decide whether the prohibition against the export of water was valid (See, *City of Altus, Oklahoma v. Carr* (W.D. Tex. 1966) 225 F.Supp. 828)" (C-6)

C. The Federal Question in a Federal Court.

It is against this backdrop that respondents brought their action for declaratory and injunctive relief. These citizens

of Mexico, none of whom have been parties to litigation challenging the County and McDougal's ability to exclude them from the class of prospective purchasers, sought to afford themselves of the privileges of the United States Constitution. Plaintiffs wish to engage in interstate and foreign commerce unferreted by a direct prohibition violative of Article One, Section 8, Clause 3 of the United States Constitution granting Congress alone the power "to regulate commerce with foreign nations, and among the several states . . ."

The district court, mindful of the narrow issue before it, issued a preliminary injunction barring the County of Imperial, its supervisors, agents and employees from enforcing that condition in McDougal's use permit prohibiting the sale of water for use outside of the County. (B-10)[3] It did not enjoin any state court proceedings, nor did it prohibit the County from exercising any of its police powers for land use regulation, conservation or other valid local purposes. (B-10-11)

Subsequent to the granting of the preliminary injunction, on February 16, 1978, the County pursued its nuisance remedies (albeit unsuccessfully on appeal, Court of Appeal, Fourth Appellate District, 4 Civil No. 18248, July 23, 1979) as suggested by the California Supreme Court, (C-9) and the federal district court (B-10-11). On March 6, 1979, approximately five months *after* the preliminary injunction, the trial court in an action separate from the nuisance action, entered a contempt judgment against McDougal for selling water for use outside of the County. (D1-2)[4] Later, on March 22, 1979, the trial court stayed its order pending results of

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[3]The District Court's opinion and its order are reprinted as Appendix "B" to Petitioner's Writ for Certiorari (B1-12).

[4]The California Superior Court's contempt orders are set forth in the Petition for Certiorari as Appendix "D" (D1-4).

the federal proceedings. (D-3) McDougal filed a writ of certiorari/prohibition challenging the trial court's contempt citation. The Fourth District Court of Appeal for the State of California on June 5, 1979, stayed enforcement of the judgment of contempt until further order. McDougal's writ is currently pending.

SUMMARY OF ARGUMENTS.

I.

The County of Imperial seeks to enforce an absolute and outright ban on the export of water from McDougal wells outside the County's boundaries. The restriction contained in the McDougal use permit is unrelated to any local purposes of land use regulation as explicitly found by the California Supreme Court and constitutes nothing more than a local agencies attempt to preserve its produce in the most discriminatory manner possible: a *home embargo*.

The Constitution's Commerce Clause is the basic fabric which binds this nation together. Economic fragmentation such as the type at bar has long been condemned as a usurpation of national powers by local interests and dealt with accordingly. This court has recently recognized in *Hughes v. Oklahoma*, ... US ..., 60 L.Ed. 2d 250, 99 S.Ct. 1727 (1979) the continuing viability of this concept by reiterating that state interests which impact interstate and foreign commerce must be served in a manner which is the least discriminatory against that commerce.

If the County of Imperial sought to protect any legitimate local interests they may not be found in the record. For five years the County maintained its restriction was land use oriented only to have California's Supreme Court reject its argument and observe that the restriction is simply what it states, a ban on water export and nothing more. If any other local interests were to be served, not only is the restriction in question the *most* discriminatory against commerce but it is the *least* effective in protecting local interests. If the regulation ever was intended as a land use one, or a water conservation step, would not restrictions on hours of operation, amount of water pumped, number of trucks on the site and the like have been much more effective than a ban

on interstate commerce which allows McDougal to pump and sell as much water for as many hours during the day that he can in local commerce?

Surely, this court will not countenance such a facial and unequivocal ban.

The issue before this court is not could the County of Imperial pick an effective way to regulate McDougal's commercial operation or water appropriation activities, but may it flatly prohibit interstate commerce? The answer must, to preserve the basic principles embodied in the Commerce Clause, be a resounding no!

II.

The California Supreme Court expressly refused to decide the federal constitutional question before this court because the individual before that court was estopped under state law to raise it. No judgment exists on the question presented by these third party litigants seeking to raise constitutional objections to the County of Imperial's *home embargo*.

The action in California between petitioner County of Imperial and its co-defendant McDougal was one primarily interested in enforcing McDougal's use permit, the County zoning ordinance and use permit restrictions allegedly restricting water sales for land use purposes. The County lost its litigation with McDougal in the sense that the California Supreme Court held that additional conditional use permits were not required under the County's zoning ordinance or state law to carry on an intensive commercial water and trucking operation. Nor, said the California Supreme Court, was the County's ban of water export a land use regulation. The constitutionality of that restriction was never reached and it ended up being enforced by default for McDougal was estopped to challenge its validity.

The action before this court in no way seeks to alter or deal with County land use regulations. It states simply a new and separate cause of action challenging, from a prospective purchasers standpoint, a *home embargo*. The prior California judgment was simply not a judgment on the same cause of action before this court.

It is elementary that a judgment does not include issues expressly not decided. The County's argument that the *home embargo's* enforcement which resulted from the California Supreme Court's refusal to reach the question of its constitutionality must fall of its own ponderous weight. That which did not occur cannot serve as the platform from which the spear of res judicata may be cast at those who were not present in the prior proceedings.

The County's arguments that all three plaintiffs in the present action are bound as privys to the results of the litigation between McDougal and the County is equally fallacious. The County contends that they participated in the litigation and were sufficiently close in interest as to be bound to the non decision on the *home embargo's* constitutionality. It is absolutely untrue that these non-parties participated to any degree for purposes of res judicata in the County's prior action. The mere fact that one of the plaintiffs in this action signed a declaration and entered an amicus curiae appearance is insufficient to bind him, let alone the other two non-party plaintiffs, to the proceedings in California's courts. They exercised no control over the California proceedings and were absolute strangers to it but for Mr. Munoz' two isolated acts.

Any pretense that these respondents were "entwined" or closely related with McDougal is sheer wishful thinking by the County. The only connection is that Munoz had a contract with McDougal to broker water sales and Martinez and DeLeon wish to purchase water. To say that McDougal

was therefore qualified to stand in judgment for them does not follow. How can it be said that McDougal prosecuted his lawsuit on these respondents' behalf when the one issue in which these respondents were interested was the very one McDougal was estopped to raise?

To say that since the seller cannot sell the buyer cannot buy is not an answer to these non-parties seeking redress of their rights as purchasers. To so hold would elevate the California doctrine of estoppel way above these non-parties constitutional rights of due process and their day in court.

Lastly, the County's allegation that the prior proceedings were in rem and therefore bind the whole world simply points out the paucity of its argument. Whether labels such as in rem or in personam may apply (or may not since the County has no authority for its proposition) cannot be dispositive of the rights of non-parties to litigate constitutional questions never decided in the previous "in rem," "quasi-in rem" or "in personam" proceedings. Labels do not give rights, the due process provisions of this country's Constitution do.

III.

The federal district court did not enjoin any state court proceeding. It merely enjoined the County of Imperial from enforcing its *home embargo*, leaving California's state judiciary free to decide the effect of the federal decision on its outstanding injunction. California's Superior Court chose to find McDougal in contempt but stayed any enforcement thereof pending review of the federal court proceedings. Likewise the California appellate court has declined to rule on the superior court's contempt citation, preferring to let this court decide the federal questions properly before it. Those very state court proceedings are proof of the pudding

that no state court proceedings have been enjoined in violation of 28 USC 2283.

The anti-injunction statute has, in any event, never been applied against third party litigants not party to state proceedings seeking to raise federal constitutional questions. The injunction here under consideration is governed by this court's decision in *Hale v. Bimco Trading Co.*, 306 US 375 (1938). In *Hale, supra,* the Florida court had held a statute constitutional as against a Commerce Clause question but this court sustained an injunction against its enforcement at the suit of third party litigants. In the present case, California's courts have expressly declined to rule the *home embargo* in question constitutional and *Hale, supra,* makes it perfectly clear that these third parties are entitled to injunctive relief. The anti-injunction statute, 28 USC 2283, simply does not apply to suits brought by third parties and has never been so interpreted.

Even if we assume arguendo that the statute does apply, the current injunction is pursuant to a specific exception created by congress, the Civil Rights Act. Not only is the present action within a congressionally created exception, the injunction is necessary in aid of the district court's jurisdiction and well within 28 USC 2283. The federal court has taken only the limited step by enjoining the County of Imperial from enforcing its *home embargo,* leaving McDougal and California's courts to follow appropriate state courses of action. The federal court, being the only court ever to have both subject matter jurisdiction and jurisdiction over the parties is surely free to enjoin the County from perpetuating a *home embargo* which is on its face unconstitutional.

No previously announced policy of federalism or comity will be served by applying 28 USC 2283 here. The present injunction does not reverse findings of the California Su-

preme Court for it made no findings on the embargo's constitutionality. It causes no duplication of effort since no California court is considering the question. It does not preclude the County of Imperial from enforcing any of its police powers with respect to legitimate local concerns for the injunction is narrowly drawn so as to specifically allow local exercise of the police power. Finally, the only real result of the application of 28 USC 2283 would be to force these plaintiffs to try their federal question in a state forum. The anti-injunction statute is not being raised to effectuate policies of federalism or comity but simply as blatant forum shopping.

ARGUMENT.

I.

THE RESTRICTION IN QUESTION IS AN INVALID HOME EMBARGO VIOLATIVE OF THE COMMERCE CLAUSE.

A. The County of Imperial's Ban on the Export of Water Is on Its Face an Invalid Burden on Interstate and Foreign Commerce.

The County of Imperial seeks this court's blessing of its absolute ban of interstate and foreign export of water from McDougal wells. There is no subtle shading of regulation involved here necessitating the balancing of state and federal interests. These proceedings involve a simple, straight forward and direct ban on engaging in interstate and foreign commerce. The special use permit under which McDougal wells operates states simply that permission to sell water on the premises is subject to the condition that "[t]he water will be sold only for use within the Imperial County." (58a) No questions of local land use regulation are involved, only a flat ban against sale. *County of Imperial* (C-7-8)

These federal plaintiffs seek resolution of a federal question in accordance with the self-executing provisions of the Commerce Clause. The self-executing nature of the Commerce Clause is well settled: "By its own force [it creates] an area of trade free from interference by states . . . [t]he Commerce Clause even without implementing legislation by congress is a limitation on the power of the states." *A & P Tea Co. v. Cottrell*, 424 US 366, 370-371 (1976)

At the very foundation of our republic lies the Commerce Clause. Its purpose is eloquently set forth in *H. P. Hood & Sons v. Dumond*, 336 US 525 (1949) as follows:

> "Our system, fostered by the Commerce Clause is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes

> will withhold his export, and no foreign state will by customs, duties or regulations exclude them. Likewise every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the founders; such has been the doctrine of this court which has given it reality." 336 US 525, 539

This court has long recognized that one political subdivision of this nation may not prohibit the export of its natural wealth to another. This court on numerous occasions has struck down efforts such as the one before it here in order that the paramount constitutional interest in preventing the Balkanization of the United States economy be preserved. Efforts by local interests to keep local product within man made political boundaries have long been condemned, for as this court clearly saw in *West v. Kansas Natural Gas Co.*, 221 US 229, 255-256 (1911):

> "The statute of Oklahoma recognized [gas] to be a subject of intra-state commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation . . . if the states have such power a singular situation might result. Pennsylvania might keep its coal, the northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? . . . If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

Surely, this court will not, in ruling on the propriety of a preliminary injunction, give its assent to a facial and outright prohibition of commerce.

The district court recognized the legitimate purposes for which the County of Imperial may wish to employ its police power and concluded that the instant regulation was not within them. In the federal district court's words:

> "There are many legitimate regulations which the police power would permit the County to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc." (B-10)

The regulation before this court is, on its face, a flat prohibition against interstate commerce untempered by an even minimal interest in land use regulation or water conservation. (C-7-9) As this court has made clear in *Hughes v. Oklahoma*, ... US ..., 60 Led.2d 250, 99 S.Ct. 1727 (1979):

> "Such facial discrimination by itself may be a fatal defect, regardless of the states purpose . . . At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives." ... US ..., 60 Led.2d 250, 262.

It was Oklahoma's choice of an outright ban as opposed to the least discriminatory alternative that this court was critical of in *Hughes, supra*. So it is with the case at bar. More than ample means exist for the County of Imperial to protect whatever legitimate local interests exist without the implementation of an outright ban on interstate and foreign commerce. The County's *home embargo* is simply an inexcusable exertion of local governmental power, unrequired in any land use or conservation context. The County of Imperial's objection to the appellate court's direction to decide the case in light of *Hughes v. Oklahoma, supra*, is without merit. *Hughes, supra*, is not only on point, but is controlling.

B. California Doctrines as to Water Ownership Are Irrelevant for Commerce Clause Purposes.

It was not until respondents read the County's brief on the merits that they learned that the restriction in Mc-

Dougal's use permit was really an application of California water law apparently intended to regulate appropriation among overlying owners. Throughout the California court proceedings the County appears to have believed it was enforcing a land use regulation. Reading of the petition for writ of certiorari would give no clue to the County's contention that its restrictions are a matter of California water law.

The ability of the State of California and its political subdivisions to regulate ground water appropriation is not involved in this case nor does the district court's injunction bar the County from doing so. The litigation pending before the district court is simple in nature. If McDougal has water for sale, may the County preclude him from selling it to plaintiffs? The litigation does not involve California water law.

California water law is interjected by the County as a means of explaining away, from the County's view, the devastating effect of *Altus, Oklahoma v. Carr*, 255 F.Supp. 838 (W.D. Tex. 1966), Aff'd 385 US 35 (1966) on its position. The County claims California water law, known as the Correlative Rights Doctrine, is more similar to the riparian rights law applied in *Hudson County Water Co. v. McCarter*, 209 US 349 (1908) than it is to the Texas law of appropriative rights applied in *Altus, supra*, and that its embargo should therefore be enforced. This over simplifies the California rule, totally mistakes its history and ignores the fact that ownership in the first instance is not relevant.

Trying to decide whether California's water law is more riparian than appropriative will lead us nowhere, for the fact is its neither. The California Supreme Court's decision on which the County relies for its point, *Katz v. Walkinshaw*, 1 Cal.116, 70 P.663, 74 P.766 (1903), was the culmination of several cases attempting to decide whether California

would follow the riparian or appropriative doctrine, all arising in the rough and ready world of miners and cattle barons. In fact, it was the natural outgrowth of the California Supreme Court's decision in *Lux v. Haggin*, 69 Cal.225, 10 P.674 (1886) where it decided in a 200 page opinion by a 4-3 vote that riparian rights coexist with appropriative rights, thus recognizing two radically different kinds of water rights in the same stream.

Stated simply, respondents may, with equal basis in California case law, claim California's water law is more appropriative than riparian but such an endeavor would not answer the question, would confuse the issue and lead to decision making by label application. What is at stake here is the County's ability to exclude *buyers*, not its ability to preclude McDougal's *appropriation* for the latter *is not* affected by the district court's preliminary injunction. (B-10-11)

In California, water use may be formally allocated among users in one of two manners. Individual competing water users may bring an action to create what is known as an "adjudicated ground water basin"[5] or the County of Im-

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[5]There are six such "adjudicated ground water basins" in Southern California: *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 123 Cal.Rptr. 1, 537 P.2d 1250 (1975); *Pasadena v. Alhambra* 33 Cal.2d 908, 207 P.2d 17 (1949); *California Water Service Co. v. Side Botham & Son* 224 Cal.App.2d 715, 37 Cal.Rptr. 1 (1964); *California Water Service Co. v. City of Compton*, Civil No. 506806, Los Angeles County Superior Court, California, August 22, 1961; *Mojave Water Agency v. Abbey*, Civil Nos. 130759 and 152413, San Bernardino County Superior Court, California, dismissed June 7, 1976; *Chino Basin Municipal Water District v. City of Chino, et al.*, Civil No. 164327, California Superior Court, San Bernardino County, California, January 27, 1978.

perial may avail itself of the statutory scheme of regulation in an area pre-empted by the State of California.[6]

Once McDougal has appropriated the water and is storing it it gains the same status as captured water in *Altus, supra.* This court's decision in *Hudson County Water Co., supra,* involved riparian rights and the ability to capture the water, not what may be done with it after it has been reduced to possession. The sale of water from storage tanks does not involve the same kind of state interests considered in the physical diversion of a river's course of flow from one state to another as was the case in *Hudson County Water Co., supra.*

The County in seeking to avoid *Altus, supra,* bases its water argument in an unfathomable ownership distinction. Constitutional questions and the permissibility of export bans may not be decided by the application of labels such as "ownership." As this court observed in *Hughes, supra:*

> "The fiction of state ownership may no longer be used to force those outside the state to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." ... US ..., 60 Led.2d 250, 263

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[6]The State of California by the enactment of the California water code has pre-empted the area of water regulation and given the authority to prevent waste, unreasonable use or unreasonable method of diversion of water in the state to the Department of Water Resources. California Water Code §275. Additionally, the State of California has adopted a comprehensive scheme for the regulation of the diversion and/or appropriation of ground water. California Water Code §§60000 *et seq.* The California regulatory scheme for water management requires the formation of special districts by vote of the residents of the proposed district. California Water Code commencing at §60080. Water quality control, in situations where excessive ground pumping (over drafting) impacts basin wide quality, is governed by Sections 2100 and 2101 of the California Water Code.

The banning of water for sale in interstate or foreign commerce is simply an invidious discrimination against outsiders, and as such constitutes a *home embargo*. The last minute injection of California water law, with the concomitant merry-go-round in deciding if its more riparian than appropriative, is a red herring and in no way affects the holding in *Altus, supra*, or its application here. If the County of Imperial is now, or ever was interested in allocating water use among competing interests, then respondents suggest that it put its conduct where its brief is and follow appropriate statutory proceedings and stop interfering with respondents' constitutional rights.

The County of Imperial could have, and may now exercise its police powers in a non-discriminatory manner. It is the outright ban here, as in *Hughes, supra*, that is fatal to the County's position. The County's attempted regulation like the State of Oklahoma's must fall before the paramount interests embodied in the commerce clause.

II.

NO FINAL JUDGMENT ON THE CONSTITUTIONALITY OF THE COUNTY'S EMBARGO AGAINST THE EXPORT OF WATER EXISTS.

A. Res Judicata Is Not Applicable.

For this court to bar the present action it must find that the California Supreme Court entered a final judgment on the constitutionality of the County's embargo. The first requirement of the application of *res judicata* is a final judgment involving the same cause of action. *Lawlor v. National Screen Service Corp.*, 349 US 322 (1955); *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942). The California judgment does not vest the County with a shield to cover its unconstitutional interference with interstate and

foreign commerce, for as the California Supreme Court made clear:

> "We need not decide whether the prohibition against the export of water was valid. (See, *City of Altus, Oklahoma v. Carr* (W.D. Tex. 1966) 255 F.Supp. 838") (C-6, Fn. 2)

To circumvent the California Supreme Court's plain language the County maintains that since the original action sought to enforce the County's zoning ordinance and halt the export of water the refusal to rule on the embargo's constitutionality brought about its enforcement, *ergo* a final judgment on the same cause of action. Such reasoning ignores the basic difference between the two suits. In *County of Imperial, supra,* the County sought a wide variety of relief prohibiting the violation of its zoning laws by employing tank trucks to carry large amounts of water from the well for export without a use permit. (C-1-2) These respondents do not seek to preclude the County from enforcing *any* of its *land use regulations,* they seek only relief from a *home embargo* which sets them apart from the general class of prospective purchasers.

The prior action was grounded in California zoning law and dealt with the rights of an owner to carry on a business "without a conditional use permit." *County of Imperial, supra.* (C-1) In the present action respondents seek to avail themselves of the rights, privileges and immunities found in the United States Constitution Commerce Clause as purchasers of water.

The basis of the Superior Court's judgment in *County of Imperial, supra,* as tested on appeal, was that the condition in question, "was to prevent an intensive land usage on the premises which would be incompatible with surrounding residential land uses and to thus protect the general welfare" and "was not intended to directly burden or interfere with

international commerce." (61a-62a) In reversing that notion, the California Supreme Court held:

> "The evidence relied upon by the County is insufficient to sustain the trial court's finding that the restriction was designed to prevent intensive commercial use of Simpson's property. If the commercial character of the proposed use had been a major concern of the commission it was not without means to control Simpson's business by the imposition of appropriate restrictions. Instead the commission, after extensive discussion of the water problem, issued the permit conditioned only upon a limitation of the export of water, in a resolution that referred only to that issue. Under these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, *i.e.*, a prohibition against exporting water from the county." (C-8-9)

The court thus disposed, on the merits, of the bulk of relief sought by the County. Contrasted with the affirmative holdings in reversing the trial court on land use issues the California court declined to reach the asserted unconstitutionality of the *home embargo* because the particular defendant in that action, McDougal, was estopped to raise it. In the court's view McDougal could not accept and rely on the benefits of the permit and at the same time challenge its burdens.

This failure to decide the constitutional issue resulted by default in its enforcement. It is California's non-decision that the County wishes to affirmatively assert as *res judicata*, not the court's actual holding. The County seemingly argues, "we lost all of the issues, save the one that was never decided, therefore the resulting enforcement of the *home embargo* is *res judicata*." It must be clear that the litigation presented in this case varies in scope and remedies sought and that the California court has never rendered a final

judgment on the embargo's constitutionality. That which did not occur cannot be *res judicata*. It is clear, both in California and federal courts, that principles of *res judicata* may not be asserted when a court, after an issue has been presented it, refrains from determining it. For, as the California Supreme Court has stated:

> "A judgment is not an adjudication as to matters which the court expressly refrains from determining," *Stark v. Coker* 20 Cal.2d 839, 843, 129 P.2d 390 (1942)[7]

In attempting to show that the present suit relative to the right to engage in interstate and foreign commerce is the same cause of action as advanced by the County in its prior effort to enforce it zoning ordinance, the County cites Professor Moore's treatise for the proposition that of the various tests of *res judicata* one is "whether there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights established in the first judgment." (P. 18 Petitioner's Brief)

It is clear that a judgment in the instant matter would not impair "rights or interests established" in the first judgment. The only rights or interests established in *County of Imperial v. McDougal, supra,* which may be asserted as *res judicata* or collateral estoppel were:

> (1) That the County's export prohibition is just that and *is not a land use restriction;* and
>
> (2) That *McDougal is estopped* to contest the validity of the export restriction.

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[7]In accord: *DePinto v. Landoe,* 411 F.2d 297 (1969); *Poster Exchange v. National Screen Service Corp.,* 517 F.2d 117 (1975); *Baltimore & O.R. Co. v. New York N.H. & H.R. Co.,* 196 F.Supp. 724 (1961); *Bleeck v. State Board of Optometrists,* 18 Cal.App.3d 415, 95 Cal.Rptr. 860 (1971); *Estate of Doyle,* 202 Cal.App.2d 434, 21 Cal.Rptr. 123 (1962); *Estate of Liddle,* 162 Cal.App.2d 7, 328 P.2d 35 (1958); Witkin, *4 California Procedure, Second,* 3348.

The district court's preliminary injunction in no way impairs the California Supreme Court's judgment that the export prohibition is not a land use regulation. In fact, the district court's opinion in entirely consistent with that judgment:

> "The court wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water . . . there are many legitimate regulations which the police power would permit the County to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc. The California Supreme Court noted that on remand the superior court could reach just such issues (19 Cal.3d at page 513), and nothing in the instant opinion is to be construed to the contrary." (B-10-11)

The preliminary injunction in no way impairs the California judgment that McDougal could not contest the constitutionality of the home embargo while seeking to rely on his use permit. McDougal is not challenging the use permit restriction, non-parties are. California's interests in closing the doors of its courts to permit holders such as McDougal are maintained. There are a variety of use restrictions which owners are estopped to challenge which are not constitutional in nature and the court's judgment in that regard is unimpaired.

The County argues that it is the "fruit" of their litigation with McDougal, the estoppel induced enforcement of its *home embargo*, which will be impaired. Unfortunately, that embargo's validity was not the court's judgment. Its enforcement was simply the by-product of the application of the state law of estoppel to McDougal.

Stated as simply as respondents can put it, no judgment exists as to the constitutionality of the County's *home embargo*. To bar these plaintiffs by virtue of *res judicata* would be to expressly hold that once a seller of goods is estopped in a state court to assert that he must sell those goods to all persons regardless of race, color, creed or intent to engage in interstate and foreign commerce is to assert that the whole world is barred by *res judicata* from ever raising a question which was not decided in a state court. Such a result is clearly not consistent with the first principles of justice, due process, *res judicata* or the Constitution.

III.

RESPONDENTS ARE NOT IN PRIVITY WITH McDOUGAL.

A. Respondents Did Not Participate in the Prior Proceedings in Any Manner Which Would Give Rise to Res Judicata or Collateral Estoppel.

Humberto Martinez, Juan DeLeon and Guillermo Gallego Munoz are not now, nor have they ever been parties to litigation with the County of Imperial or its co-defendant McDougal. Nowhere in the record is there any connection between these litigants and *County of Imperial v. McDougal, supra,* save the fact that one of them signed a declaration (64a-66a) which McDougal affixed to his answer and subsequently appeared as *amicus curiae* before the California Supreme Court (67a-84a).

The County in its haste to foreclose these litigants from their day in court absolutely ignores the status of Messrs. *Martinez* and *DeLeon* in its arguments. The County continually equates Munoz' declaration and *amicus* appearance with the *participation* in a lawsuit required by the principles of *res judicata* to bar not only Mr. Munoz, but Martinez and DeLeon who signed no documents and made no appearances. The argument that Munoz is somehow in privity

with McDougal is weak enough, let alone that his conduct binds Martinez and DeLeon who are absolute strangers. The only connection between Martinez, DeLeon and McDougal is that they agree with the argument that McDougal was estopped to argue: that the *home embargo* is unconstitutional.

It is beyond refutation that Munoz' two affirmative acts are insufficient to bind him to the judgment in *County of Imperial v. McDougal, supra*. First of all, the innocuous declaration filed by McDougal (64a-66a) cannot give rise to res judicata. Petitioner cites no authority, and respondents could find none, for the proposition that signing a declaration under perjury gives rise to *res judicata*. Respondents would note that to apply res judicata to such conduct would lead to an absolute scarcity of declarants, deponents and witnesses in future litigation.

With respect to the filing of an *amicus* brief, it is a certainty that Munoz was not bound by the ultimate decision, for as this court has said:

> "It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that the judgment in such a case would estop the intervenor in a suit of his own which presented the same questions." *Stryker v. Crane*, 123 US 527, 540 (1887)[8]

In commencing its discussion of the participation in the prior litigation, the County cites a rule in support of its contention that it claims to have derived from Professor Moore:

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[8]California is in accord. Witkin, *3 California Procedure, Second*, 1891.

> "If a nonparty, who *thus* participates in litigation has an interest sufficiently close . . . the participating non-party should be bound . . ." (Emphasis added) (P.20, Petitioner's Brief)

The word, *thus* in the cited portion of course indicates that there is a missing subject matter. What is omitted is the portion of the text, the subject matter in which the editor discusses what a person who is a non-party may do to influence the litigation which would lead to his being bound:

> ". . . if an interested non-party is unable, or does not wish to intervene, by what methods can be protect his interests? He can offer himself as *amicus curiae*, but an amicus curiae does not have the status of a party; cannot as such, exert any control over the course of the litigation; and is neither bound nor benefited by the conclusive effect of the resulting judgment. If an interested non-party's status as *amicus curiae* would not provide sufficient scope for the protection of his interests, and the non-party is not able to or does not desire to intervene, he has at least two alternatives from which to choose; he may bring his own suit, possibly for declaratory judgment; or he may be able to take control of the suit to which he is a non-party.
>
> "If a non-party who *thus* participates in litigation has an interest sufficiently close . . . the participating non-party should be bound." 1B *Moore's Federal Practice*, §0.411[6]

It may be seen therefore that petitioners have excised the subject matter so that one who did not carefully examine the cited pages would not know that Professor Moore was actually setting forth a two fold test to bind a non-party: (1) he must *take control* of the litigation and, (2) have an interest sufficiently close to be bound.

Elements of control which might bind a non-party are discussed in the *Restatement Of The Law Of Judgments, Second,* as follows:

> ". . . to have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain appellate review . . . whether his involvement in the action is extensive enough to constitute control is a question of fact, to be resolved with reference to these criteria. It is sufficient that the choices were in the hands of the counsel responsible to the controlling person; moreover the requisite opportunity may exist even when it is shared with other persons. It is not sufficient, however, that the person merely contributed funds, or advice in support of the party, or merely appeared as amicus curiae." *Restatement Of The Law Of Judgments, Second,* Section 83, Comment (C).

Even if we were to find that Martinez, DeLeon and Munoz controlled the McDougal litigation, of which there is absolutely no proof, such control would only bar the controlling non-party with respect to issues determined. This results from the fact that "his assumption of control does not make him a party to the litigation." *Restatement Of The Law Of Judgments, Second,* §83, Comment (B). See also, *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.*, 24 Cal.App.3d 410, 100 Cal.Rptr. 826 (1972), upon which illustration 3 of the *Restatement Of The Law Of Judgments, Second,* §83 is based. Thus, if respondent *Munoz* was found to control the litigation in the sense previously set forth (effective choice of legal theories, proofs, opportunity to obtain appellate review) *he* would only be precluded from testing the two issues determined: (1) the condition is not a land use regulation and, (2) McDougal, as successor to the original person who obtained the use permit, may not

contest the constitutionality of the restriction. He would not be precluded from testing issues never decided.

There are no assertions that Martinez and DeLeon were even involved by way of knowledge of the prior proceedings let alone that they took control to the point of being bound. Nor are there assertions that Munoz had control, only that he signed a declaration and appeared as amicus curiae. It goes without saying that these parties were not in control of the prior litigation within the context of case law and treatises cited by the County for such a proposition. They are therefore, not bound.

B. Respondents' Interests and McDougal's Interest Were Not Identical for Purposes of Res Judicata.

The County wishes to tar non-parties with McDougal's estoppel because, (1) Munoz is McDougal's broker for the sale of water, (2) Munoz shared an outcome in the litigation and, (3) if the seller cannot sell, the buyer cannot buy. Several cases are cited for the proposition that non-party privy may be bound.[9]

Certain rules relative to this concept are set forth by the County at Page 21 of its Brief as derived from *Southwest Airlines Co. v. Texas Intern. Air Lines*, 546 F.2d 84 (1977). In *Southwest, supra*, the court noted that the contractual and representative essence of the doctrine of privity is iden-

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[9]For example, *Souffront v. La Compagnie des Sucreries del Porto Rico*, 217 US 475, (1909) which stands for the proposition that where Spanish and French law allow a vendor no longer in title to maintain an action on behalf of his vendee, US courts will recognize the rights of the vendee and his successors to benefit from the results even though under general rules, *res judicata* would not result since no one is in privity to a judgment where he obtained title to the property *prior* to commencement of the suit by his grantor. Additionally, the case stands for the proposition that one who prosecutes or defends a suit in the name of another may be bound by the judgment. Neither proposition relates to the case at bar.

tified with the party trustee to his non-party bondhold while at the same time rejecting lessor-lessee as among the relationships requiring preclusion. Finally, the rule of *Southwest, supra,* was simply this: all attempts to find privity were rejected except one:

> "The proposition that governments may represent private interests in litigation is clear." 546 F.2d 84, 98.

Southwest, supra, is of no comfort to the County for although it qualifies as a government it cannot be said it represented these private interests. What it did, and is still trying to do, is emasculate these respondents' constitutional right to engage in interstate and foreign commerce.

Turning to the community of interests and identity, Martinez, DeLeon and Munoz had with the losing party in *County of Imperial, supra,* it could reasonably be said that all respondents were in sympathy with McDougal. Any pretense of identity of interests, however, evaporated when the California District Court of Appeal ruled the restriction in question to be an absolute bar of interstate commerce and precluded by virtue of the United States Constitution thereby rendering McDougal's use permit *void*. By the time the case arrived at the California Supreme Court there was a clear divergence of interest between McDougal and Munoz (the only respondent here who knew about the litigation). McDougal sought at all costs to retain his use permit while Munoz sought to argue the constitutional issues. Any identity of interest between Munoz and McDougal was then and is now, tenuous at best.

The identity of interests between DeLeon, Martinez and McDougal is absolutely and completely missing. Nowhere in the record does it even appear that they were even apprised of the prior litigation. To foreclose Martinez and DeLeon, let alone Munoz, would make a shambles of the require-

ments of privity that the non-party sought to be bound have an identity or community of interest with and adequate representation by the losing party in the first action.

More importantly, it is hard to see how any of these respondents' interests were adequately represented by McDougal. Certainly arguments in which they were interested and would be benefited by were advanced by McDougal. Yet, it strains credibility to assert that they received their day in court at the hands of the one individual who, by his conduct, was estopped to raise the very issues they would be interested in. McDougal cannot be said to be representative of respondents for in order to be representative he would have to have been in a position which would allow, not preclude, the court to reach the issue of the *home embargo*.

How can these respondents rely on a person who is estopped to raise the issue of constitutionality to adequately represent their interests in challenging that very constitutionality. To state the question is to answer it: McDougal could not and did not stand in their shoes so that *res judicata* might forever deny them federal vindication of their constitutional rights.

C. The Argument That if the Seller Cannot Sell, the Buyer Cannot Buy Is Circular.

The County argues that since McDougal is bound by the export restriction all prospective purchasers must likewise be bound, since they can acquire no greater rights than the owner of the land. The argument misses the point for respondents claim no ownership rights in the land for they have none. What the County is really saying is that since McDougal is precluded by county law from selling to respondents, they have no rights to buy. A circular argument at best.

The fact is that McDougal has a right to sell as much water as he can, using as intensive a commercial trucking operation as he may, without running afoul of California nuisance laws. The instant litigation does not affect McDougal's rights in the land for his operations in pumping and commercial intensity are unrestrained. McDougal could conceivably carry on a massive bottled water program of his own for sale to residents of Imperial County involving double the water and trucks. The question before this court is not "may respondents gain greater rights in land than the owner" but may a local county, relying on a conditional use permit, determine that purchasers may not engage in interstate and foreign commerce. To say since the seller may not sell to designated classes, therefore those classes cannot buy due to *res judicata* is not only no answer to the question posed but opens pandoras box. If the argument is correct then the forces intent on abridging and denying civil rights will have gained a potent weapon. Would that future owners of the Heart of Atlanta Motel, and those similarly disposed, could rely upon the principle that if the seller is estopped to challenge a provision in his use permit barring sales to certain classes of buyers the buyers would likewise be precluded from challenging the restriction due to *res judicata, eg., Heart of Atlanta Motel, Inc. v. United States* 379 US 241 (1964).

D. The Prior Proceedings Were Not In Rem.

Although the mechanistic use of *In Rem v. In Personam* Judgments found in *Pennoyer v. Neff*, 95 US 714 (1878) was essentially disposed of in *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950) the County asserts that its prior litigation was *in rem* albeit there is a dearth of authority on the point (Petitioner's Brief P.22), and that the whole world is thereby bound by McDougal's estoppel.

One need look no further than *Hansberry v. Lee*, 311 US 32 (1940) to put this notion to rest.

Hansberry, supra, involved litigation by a land owner seeking to enforce a restrictive covenant barring Negroes from an Illinois neighborhood. Since prior Illinois state litigation found that owner's agreement to be a binding covenant running with the land, land owner Lee sought to enforce through *res judicata* that covenant against successor in interest and land owner Lee. This court characterized that judgment as *in personam:*

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he has not been made a party by service of process . . . (citations omitted) . . . in the judgment for the latter." 311 US 32, 42, 43 (1940)

As the prospective sellers in *Hansberry, supra*, could not stand in judgment for future buyers such as Lee, seller McDougal could not and did not stand in judgment for future buyers Martinez, DeLeon and Munoz.

E. The State of California Has No Interests in Barring Respondents From Their Day in Court.

The State of California has no interests whatsoever in the application of *res judicata* against non-parties to issues its courts have never decided. The states only interest, that McDougal not be allowed access to state courts to contest a use permit restriction due to estoppel is unimpaired.

Federal interests would, however, clearly be subverted by applying *res judicata* in these circumstances. Non-party litigants would be denied access to federal courts to redress a constitutional wrong that no state, let along the County of Imperial, may by the very terms of the Constitution have an interest in perpetuating. A basic denial of due process

would occur for simple state grounds of estoppel would be elevated above the constitution itself. Surely *res judicata* in the federal courts, applying federal law, *Heiser v. Woodruff*, 327 US 726 (1946), would not place state estoppel of McDougal above the constitutional mandates of the commerce clause and due process as asserted by Martinez, Deleon and Munoz, non-parties. Application of *res judicata* would run counter to every involved federal policy while its non-application would impair no legitimate state interest. Application of *res judicata* to non-parties would sanction the deprivation of their rights in an action in which they were not parties and further lend support to the long discredited concept that the government (County of Imperial) may condition the consent to perform lawful activities on the exaction of unconstitutional prices.[10] Finally, a blatant *home embargo* contrary to the basis upon which the constitution was founded would be left intact.

IV.

28 USC 2283 DOES NOT BAR THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT.

A. No State Court Proceedings Have Been Enjoined by the District Court.

It is just not true that the district court enjoined California state court proceedings. Contrary to the County of Imperial's recitation of cases such as *Hill v. Martin*, 296 US 393 (1935) it is significant that the district court's injunction runs *only* to County officials and not to California courts. The evils which *Hill v. Martin, supra*, and the other decisions the

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[10]For the doctrine of unconstitutional conditions, see *Terral v. Burke Construction Co.*, 257 US 529 (1922); *Frost v. R.R. Commission*, 271 US 583 (1925); *Wheeling Steel Corp. v. Glander*, 337 US 562 (1949); *Gomillion v. Lightfoot*, 364 US 339 (1960); *Garrity v. New Jersey*, 385 US 493 (1967); and *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 884 (1946).

County cites seek to avoid are of the type that, (1) parties ought not be in a position of having to obey two conflicting decisions, and (2) the practical result of a federal injunction should not be the actual barring of state court proceedings. Neither of those principles were violated by the district court's order.

The federal district court merely enjoined *enforcement of the use permit by the County*; it issued no order affecting the state court's outstanding injunction. Rather, it left that court free to decide for itself the effect of the federal court proceedings. In point of fact the validity of this analysis is borne out by the actuality of state court proceedings against McDougal in the form of a contempt citation. (D-4)

California statutory and case law recognizes the inherent authority of a court to enforce its own orders without the necessity of affirmative action by the parties.[11] The federal district court's order in no way lessens the state court's authority or enjoins its conduct of its own proceedings as witnessed by the *fact* that *it did proceed*. Any argument over contempt between McDougal and the California judiciary about his choice to sell water without first seeking a modification of the state court injunction based on the federal court ruling is between him and the state court and the federal injunction running against the County's conduct is in no way involved. That action is now running its course through California courts free of the district court's interference.

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[11]California Code of Civil Procedure §128: "Every court shall have power: . . . (4) to compel obedience to its judgments . . .;" CCP § 177: "Every judicial officer shall have power: . . . (2) to compel obedience to his lawful orders . . .;" CCP §178: "For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt . . .;" *In Re McKinney*, 70 Cal.2d 8, 74 Cal.Rptr. 580, 447 P.2d 972 (1968).

Our dual judicial system *is* operating without the presence of the conflicting orders between federal and state courts which 28 USC 2283 is designed to prevent. The California courts have recognized this by staying their proceedings pending decision on the federal questions. The federal court has not, as demonstrated by the fact of McDougal's contempt citation, enjoined state court proceedings and 28 USC 2283 is therefore not applicable.

B. 28 USC 2283 Will Not Bar a Preliminary Injunction at the Suit of Those Who Have Never Had Their Day in a Federal or State Forum.

The County of Imperial seeks to place 28 USC 2283 as a barrier between three citizens of the Republic of Mexico and their first and only challenge of the enforcement of an unconstitutional *home embargo*. These plaintiffs do not seek to avoid a land use regulation nor does the County of Imperial seek to enforce one for none exists. The County of Imperial does not seek to enforce a judgment against these plaintiffs, for none exists. Neither the County of Imperial or the respondents are before this court testing the police powers of the County of Imperial to prevent nuisances or protect the County's water supply for the district court's injunction bars neither. The County of Imperial raises 28 USC 2283 as a sword solely for the purpose of preventing interstate and foreign commerce between the Republic of Mexico and the County of Imperial. Respondents seek simply to purchase and transport pure, sweet and clear water to their compatriots in the Republic of Mexico who continue to suffer from the increasing salinization of the Colorado river.

The issues of federalism embodied in 28 USC 2283 are cleverly raised by the County to mask its real intent by

mechanically applying the statute to prevent a non-existant friction between the state and federal judicial system.

The "anti-injunction" statute's original purposes have never been clear but have long been subject to debate, scholarly pursuit, and judicial interpretation. One need turn no further than the contrasting analysis by the majority and dissent in *Atlantic Coast Liner Co. v. Brotherhood of Locomotive Engineers*, 398 US 281 (1970) to demonstrate this debate. For a compelling discussion of the statute's venerability, see the exhaustive efforts of Professor Mayton in *Ersatz Federalism Under the Anti-Injunction Statute*, 78 Columbia Law Review 330.

Whatever view one might take of the statute's original *raison d'etre* the one point in fact upon which all parties to the debate have agreed is that it does not bar injunctive relief in favor of those who have never had their day in court. The statute has never been applied against third parties raising federal constitutional issues.

The shifting emphasis of policies underlying the statute culminated in Mr. Justice Frankfurter's majority opinion in *Toucey v. New York* 314 US 118 (1941), where the court opted for a stringent application of the statute disavowing all exceptions to its application save those expressly authorized by congress. *Toucey, supra*, was subsequently overruled by the U.S. Congress as noted by this court in *Mitchum v. Foster*, 407 US 225 (1972):

> "The Congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC 2283, which, as the Revisors Note makes evident, served not only to overrule the specific holding of *Toucey* but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." 407 US 225, 236

To determine the availability of 28 USC 2283 as a shield or a sword in a particular transaction, the court in *Mitchum, supra*, made it clear that it was necessary to determine what the law surrounding the statute was prior to *Toucey, supra*. (id)

In an effort to seek out the law prior to Mr. Justice Frankfurter's 1941 majority opinion in *Toucey*, one need look no further than the same Mr. Justice Frankfurter's 1939 majority opinion in *Hale v. Bimco Trading Co., Inc.*, 306 US 375 (1939) wherein the court concluded that third parties are not barred by the anti-injunction act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state court.[12] The case at bar is a virtual reincarnation of *Hale, supra*, with the County of Imperial playing the role of the State of Florida, its co-defendant McDougal playing the role of Hale and respondents Munoz, Martinez and DeLeon seeking relief similar to that sought by the Bimco Trading Company. The similarities are numerous:

1. The State of Florida sought a writ of mandamus requiring Hale to enforce a statute requiring the payment of fees prior to the importation of foreign cement by companies like Bimco; the County of Imperial sought in injunction against McDougal flatly forbidding the sale of water for use in interstate and foreign commerce.

2. In *Hale, supra*, the Florida Supreme Court issued the writ commanding the statute's enforcement and specifically held it valid as against a constitutional challenge premised on the Commerce Clause; the California Supreme Court

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[12]Even the *Toucey v. New York, supra*, court explicitly recognized the viability of the decision in *Hale v. Bimco, supra*, at 314 US 118, 137 N.7

upheld the injunction, in part, but unlike the Florida court in *Hale, supra,* refused to decide the constitutional question.

3. The Florida Supreme Court stayed the mandamus proceedings against Hale while a third party — Bimco Trading Co., Inc. — pursued its federal remedies in a separate suit against Hale and the State of Florida; in the case at bar, the California Superior Court and Court of Appeal have stayed state contempt proceedings brought against McDougal while third parties — Munoz, Martinez and DeLeon — pursue their separate suit against the County of Imperial and McDougal. (D-3)

4. The regulation enforced in *Hale,* like the regulation sought to be enforced here was unconstitutional on its face.

To the suggestion that 28 USC 2283 precluded relief to third parties litigant in *Hale, supra,* Mr. Justice Frankfurter said it all when he observed:

> "To invoke Section 265 in these circumstances is to assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute bars injunctive relief in a United States District Court against the enforcement by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceedings bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so. *Chase National Bank v. Norwalk,* 291 US 431, 441, 54 S.Ct. 475, 479, 78 L.Ed 894.
>
> ". . . The Supreme Court of Florida itself manifested no such strangling conception of Section 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive exercise of authority by a United States court. On the contrary, in staying 'all further proceedings and action' until this court had finally passed upon its constitutionality, the Supreme Court of Florida recognized

> the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues." 306 US 375, 378

Hale v. Bimco Trading Co., Inc., supra, controls the issue at bar. The conclusion follows not only in light of the virtual identity of circumstances but is compelled as a result of the factual differences. In *Hale, supra,* the state court specifically held the statute in question to be constitutional, while the California Supreme Court refused to decide the constitutionality of the *home embargo*. In spite of the Florida court's ruling that the statute was constitutional, the US Supreme Court upheld the injunction at the suit of third parties and had no difficulty in setting aside the state's statute:

> "Such assumption of national powers by a state has, ever since March 12, 1827 (*Brown v. Maryland,* 12 Wheat, 419 L.Ed 678) been found to be in collision with the Constitution. It can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state." 306 US 375, 380

Thus, if injunctive relief will lie at the hands of third parties even when the state's highest tribunal has decreed the regulation in controversy to be constitutional, respondents submit that they must be entitled to injunctive relief where California's highest court refused to decide the constitutionality of the restriction in question. Like Mr. Justice Frankfurter in *Hale, supra,* respondents here cannot imagine an enactment "more clearly designed then the present to circumvent what the Commerce Clause forbids." 306 US 375, 380

C. If 28 USC 2283 Were Applicable, the District Court's Order Was in Aid of Jurisdiction and as Such Exempt.

It would be fruitless for a federal court to determine that a state practice violated the US Constitution without issuing

an order to end the practice. It would seem that a declaratory judgment is not necessarily binding on state officials. See concurring opinion in *Steffel v. Thompson*, 415 US 452, 482 (1974).

The "in aid of jurisdiction" exception should not be limited to "in rem" cases (which the County claims this is, P. 22, Petitioner's Brief) but should be available in cases involving federal questions. *Tampa Phosphate R. v. Seaboard Coastline R.R.*, 418 F.2d 387 (1969); *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61 (1968); Mayton, *Ersatz Federalism*, 78 Columbia Law Review 330, 357-363. The district court might, therefore, take the ordinary and accepted step of enjoining enforcement by *County officials* in aid of its jurisdiction.

The federal district court, once it acquired subject matter jurisdiction over the Commerce Clause issues over which the state courts have abandoned jurisdiction is surely free to preserve its jurisdiction until the suit is completed.

Not only is the district court the *only* court with a subject matter jurisdiction over the Commerce Clause issue, it was the first and *only* court with the jurisdiction over the parties. The California courts never had, or ever asserted they had, jurisdiction over those parties who never had their day in court: Messrs. Munoz, Martinez and DeLeon. 28 USC 2283 does not present a bar where the federal court was the *first* court to obtain jurisdiction over the parties, and the *only* court with jurisdiction over the subject matter. A decent respect for the California Supreme Court does not require us to deny these litigants their remedies against the County of Imperial.

In this case, the court enjoined *only* the County and left to the state court the discretion to determine what effect it would give to the federal proceedings. Certainly, this limited

step was "*necessary*" in order to properly vindicate the federal court's jurisdiction. Such an injunction in order to implement federal question jurisdiction is an accepted part of the "in aid of jurisdiction practice" that congress in 1948 incorporated and embodied in its re-enactment of the "anti-injunction statute." See, Mayton, *Ersatz Federalism*, *id*, at 357 N.161, 363, 367.

D. The Instant Litigation Is Within the Civil Rights Act and as Such Is a Specifically Authorized Exception to 28 USC 2283.

The Civil Rights Act of April 20, 1871, has been a focal point of the instant litigation from the outset. (Clerk's Record on Appeal 218). Respondents have alleged that representatives of the County of Imperial are acting pursuant to County law to discriminate against interstate and foreign commerce in such a manner as to entirely prohibit that commerce. Violations of 42 USC 1983 have been specifically found by all courts of the United States to be exempt from the restrictions of 28 USC 2283 as an express exception. Such was the specific holding of *Mitchum v. Foster*, (1972) 407 US 225.

There can be no question that the rights being litigated by respondents herein are covered by Section 1983 of Title 42 for as the court has noted in *Lynch v. Household Finance Corp.*, 405 US 538 (1971):

> "In *United States v. Price* 383 US 787, 797 . . . we interpreted the phrase, "rights, privileges or immunities secured . . . by the Constitution or laws of the United States," contained in 18 USC 242 to embrace "*all* of the Constitution and laws of the United States." The similar language in §1983 and 1343 (3) was originally modeled on §242's predecessor, §2 of the Civil Rights Act of 1866 . . . In *Price*, *supra*, we said that, "[w]e are not at liberty to seek ingenuous and analytical

instruments'' to avoid giving a congressional enactment the scope that its language and origins require.'' 405 US 538, 549, FN. 16.

Thus it is clear that respondents herein have brought an action for the right, privilege or immunity of operating in foreign commerce with citizens of the United States without being subjected to a *home embargo* by local political subdivisions. That right, privilege or immunity is secured to all people within the jurisdiction of the United States pursuant to 42 USC 1983 and as such, actions to enforce those rights are specifically excepted from 28 USC 2283.

E. This Court's Decision in Vendo v. Lectro-Vend Is Inapposite to Litigation Commenced by Individuals Not Party to Prior State Court Proceedings.

The County of Imperial blandly asserts that this court's interpretation of the so called ''anti-injunction statute'' in *Vendo v. Lectro Vend Corp.*, 433 US 623 (1977) flatly bars the preliminary injunction issued by the district court. In *Vendo, supra,* the federal plaintiffs and state court losers sought to preclude enforcement of a state court judgment by simply shifting the focus of the conflict from the state courts to a federal forum.

Such is not the case at bar: respondents Munoz, Martinez and DeLeon are not losers seeking to avoid an adverse judgment by packing up their rhetoric and shipping it to the federal district court. There were never proceedings involving the instant plaintiffs and there are not now any state actions pending in which they are involved or the constitutional question is presented.

The losers in *Vendo, supra,* had commenced their federal anti-trust action almost concurrently with the Illinois state litigation but allowed it to lie ''dormant'' while they had their day in state court. No such lying in the weeds is present

here. Respondents filed this action asserting their federal constitutional rights as soon as they learned that the constitutionality of the County's *home embargo* would not be decided by the California courts. Munoz, Martinez and DeLeon did not sit on their rights while engaging in state litigation but promptly brought their federal action. Losers seeking to restrain enforcement of a judgment after nine years cannot be said to be in the same category as those who have never been in court seeking to test an issue specifically not decided by a state court. Query, if the *Vendo* case were an action by *Vendo's* customers — much like McDougal's customers Munoz, Martinez and DeLeon — seeking independent federal relief under the anti-trust statutes alleging unlawful efforts by *Vendo* to create a monopoly, fix prices and restrain trade, all to the detriment of those customers, whether or not the result would have been different.

Not only is there an absolute lack of similarity between the case presented in *Vendo, supra,* and the one at bar but it is a classic irony that it should be mechanically asserted in defense of a *home embargo*. It is in the dissent in *Vendo, supra,* that respondents' most compelling argument is presented. Substituting the phrase *home embargo* for "Sherman Act" sums up respondents' views:

> "When principles of federalism are invoked to defend a violation of the Sherman Act [sic. *home embargo*] one is inevitably reminded of the fundamental issue that was resolved only a few years before the anti-injunction statute was passed. Perhaps more than any other provision in the Constitution, it was the Commerce Clause that transformed the ineffective coalition created by the Articles of Confederation into a great nation:

"It was . . . to secure freedom of trade, to breakdown the barriers to its free flow, that the Annapolis convention was called, only to adjourn with a view to Philadelphia.

"Thus, the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate causes of our national existence down to today.

"So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the Commerce Clause in the new structure of power.

'. . . On this fact as much as any other we may safely say rests the vast economic development and present industrial power of the nation. To it may be credited largely the fact we are an independent and democratic country today.' W. Rutlege, A Declaration of Legal Faith, 24-27 (1947)" 433 US 623, 665

F. Principles of Comity and Federalism Do Not Require the Denial of Injunctive Relief in the Instant Case.

The policy upon which 28 USC 2283 rests is the need to prevent conflict between two judicial systems functioning within the same forum, not to impose an expanded concept of *res judicata* on third parties. To bar those who have never had their day in court from litigating constitutional issues never decided by state courts would be to expand the role of Section 2283 to the point where its procedural proscriptions, designed to allow two judicial systems to function side by side, are elevated above basic principles of due process and the Constitution itself. Such certainly was not

congress' intent. No previously identified policy of federalism will be served by denying those who have never had their day in court access to the federal system.

It cannot be said that congress intended the anti-injunction statute to be applied in such a manner as to rise above the concepts of due process embodied in the Fifth Amendment of the United States Constitution. Application of anti-injunction statute in the present case would elevate it to heights never contemplated by congress. As the Circuit Court of Appeals for the District of Columbia noted in rejecting the contention that federal court plaintiffs were estopped by a previous litigation in which they were allegedly vicariously represented:

> "as the Supreme Court has declared . . . no court can adjudicate directly upon a persons rights, without the party being either actually or constrictively before the court. This basic tenet of due process can hardly be circumvented through the ritualistic invocation of comity." *Consumers Union v. Consumer Product Safety Commission*, 590 F.2d 1209 1221 (1978)

From the earliest times, expressed by Mr. Justice Harlan's dissent in *Ex-parte Young*, 209 US 123 (1907), and up through *Younger v. Harris*, 401 US 37 (1971), this court has been concerned with the potential for review and possible reversal of the highest tribunal of a state's judicial system by a federal trial court. That basic underlying policy has not been breached by the instant injunction. The California Supreme Court has never ruled on the issues presented by these respondents to the federal court. Quite the contrary, this action represents a federal assumption of a federal issue clearly left by the California courts for federal decision.

This court has recently expressed its concern in *Younger v. Harris, supra, Mitchum v. Foster*, 407 US 225 (1972), *Huffman v. Pursue Ltd.*, 420 US 592 (1975), *Doran v.*

Salem Inn, Inc., 422 US 922 (1975) and *Wooley v. Maynard*, 430 US 705 (1977) that notions comity and federalism require that state court proceedings be left to run their course premised on the sound belief that state courts are competent to do their jobs with respect to the enforcement of our Constitution. No violence is done to this policy consideration by the instant injunction, for as it is noted in *Huffman v. Pursue Ltd., supra,* and *Steffel v. Thompson,* 415 US 452, 462 (1974):

> "The relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding."

There are no California state proceedings pending with respect to the federal issue. The state court proceedings have run their course resulting in a purely state decision on independent grounds of estoppel thereby avoiding constitutional questions.

28 USC 2283 does not dictate that respondents here bring their action in the state forum as opposed to the federal forum. The ultimate ramification of the application of 28 USC 2283 in the instant litigation would be to divest the federal court of its diversity and federal jurisdiction forcing the litigants to pursue their rights in the state forum. The congressional policy is to the contrary:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that

> 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction .... The right of party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' " *England v. Louisiana State Board of Medical Examiners*, 375 US 411, 415 (1964).

Raising 28 USC 2283 is simply blatant forum shopping on petitioners part. The instant litigation will not result in a federal court analyzing constitutional questions currently pending before a state court. The state courts of California have recognized this basic truth by staying the contempt proceedings commenced against McDougal after the district court granted its preliminary injunction while awaiting this court's judgment.

The California Supreme Court in no uncertain terms has divested itself and its inferior tribunals from any and all jurisdiction over the subject matter of the Constitution's Commerce Clause. It cannot be said in the face of the recognition by California courts of the exclusive remedy of these respondents to seek federal review that they are somehow barred by the very principles of federalism and comity which the California courts recognized in staying the contempt proceedings. 28 USC 2283 does not apply, nor need it.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM H. KRONBERGER, JR.,

Attorney for Respondents.

Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, CALIFORNIA and the SUPERIOR COURT OF CALIFORNIA, in and for the COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO BRIEF FOR RESPONDENTS AND TO AMICUS CURIAE BRIEF.

JAMES H. HARMON,
County Counsel,
County Court House,
939 Main St.,
El Centro, Calif. 92243,
(714) 352-3610 ext. 250,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, CALIFORNIA and the SUPERIOR COURT OF CALIFORNIA, in and for the COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO BRIEF FOR RESPONDENTS AND TO AMICUS CURIAE BRIEF.

The County of Imperial, California, ("County") and Superior Court of California, in and for the County of Imperial ("Superior Court") respond to the Brief for Respondents and Amicus Curiae Brief, as follows:

I.

THE CALIFORNIA SUPREME COURT ADJUDICATED ENFORCEABILITY OF THE EXPORT RESTRICTION IN McDOUGAL'S USE PERMIT AND THEREBY BARRED RESPONDENTS' ACTION.

A. Notwithstanding Avoidance of Any Constitutional Issue, the McDougal Decision Is Clearly a Final Judgment on the Merits so as to Bar Respondents' Action Under Either the Doctrine of Res Judicata or Collateral Estoppel.

In arguing *County of Imperial v. McDougal,* 19 Cal.3d 505 (1977) is not res judicata as to their action, Respondents and Amicus Curiae ("McDougal") emphasize the State Supreme Court did not determine the constitutionality of the subject use permit export restriction. (RB 20, 39, 44-47; AC 7.)[1] They further stress McDougal's right to continue to use tank trucks in his water sales operations. (RB 21, 31; AC 5, 6.) These factors, however, do not make *McDougal* a "non-decision" as to the merits of Respondents' action, as contended. (RB 21.)

The California Supreme Court, in partially affirming the judgment of the Superior Court, concluded said trial court's judgment ". . . enjoining [McDougal] from 'conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972' appears to relate both to the sale of water for export outside the county and to the use of substantial numbers of trucks to carry the water from the property. *We conclude that the judgment must be upheld in the first aspect* but that there was insufficient

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[1]The Brief for Respondents, Amicus Curiae Brief and Brief for the Petitioners are referenced as "RB," "AC" and "PB," respectively. Abbreviated references used in the latter brief also appear herein.

evidence to justify the prohibition against the manner in which the business was operated." (C 4 emphasis added.)

Based on facts which established McDougal's predecessor agreed to imposition of the export restriction, and benefitted from the use permit as issued, the State Supreme Court held ". . . McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the County is invalid, *and he is bound by the limitation*." (C 6 emphasis added.)

The State Supreme Court concluded it was unnecessary, under the facts of the case, to determine whether imposition of such an export restriction was constitutional. Specifically, the Court stated "[i]n view of this [estoppel] conclusion, we need not decide whether the prohibition against the export of water was valid." (C 6 Ftn. 3.)[2]

As shown, estoppel *is* an adequate and independent ground for a state court decision. (See *Enterprise Irrigation v. Farmers Mutual Land Co.*, 243 U.S. 157 (1916) and other authorities cited at PB 17-18.) In fact, constitutional questions are typically not determined by the courts, unless such a determination is absolutely necessary (16 C.J.S. Constitutional Law §94.) McDougal's appeal to this Court, wherein he attempted to renew his challenge to the use permit export restriction on constitutional grounds, was dismissed for want of a substantial federal question. (439 U.S. 944.)

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[2]The Court further indicated *Shelley v. Kramer*, 334 U.S. 1 (1947) relied on by McDougal is "inapposite" because said case "did not involve the waiver of rights or the challenge to the validity of a condition to the economic value of a permit whose benefits the permitee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional right which the petitioners in *Shelley* sought to vindicate." (*Id.*).

Clearly, the State Supreme Court finally adjudicated the enforceability of the subject export restriction as against McDougal. Despite arguments to the contrary, it is apparent Respondents' action is merely a collateral attack on the *McDougal* decision.

As shown, any right to sell water from lands in the County depended on proper zoning entitlement. McDougal's predecessor acquired a use permit for the subject parcel and agreed to imposition of the subject export restriction. By purchasing the parcel, McDougal succeeded to rights under the permit but he also took subject to the limitation. (C 18.)

Respondents might have sought to acquire a right to export water by purchasing land and applying for a use permit to authorize such export. Or, they can purchase water from a land owner who already possesses proper entitlement.[3] Their action does not seek to vindicate any such rights. Instead, it seeks (and for the moment has achieved) an injunction against enforcement of the export restriction in McDougal's use permit. (1a-25a; B 12.)

Respondent Gallego Munoz has been McDougal's broker for water sales in Mexico and he participated in the state court proceedings with McDougal as *amicus curiae* before the State Supreme Court. (67a-78a.) Messrs. Martinez and De Leon are likewise contractors of McDougal and/or of Gallego Munoz. (7a.) Said Respondents are not "strangers" and they have established no independent standing separate from McDougal.[4]

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[3]The record establishes Respondents *are* authorized to acquire and export water from the "Clifford Well" located in the County, but they instead seek to purchase cheaper water from McDougal, whose well is located 8 miles nearer the international border. (34a, 40a).

[4]The County wishes to incorporate by reference its arguments and authorities appearing at PB 18-23.

Respondents claim the County's arguments are "circular." (RB 30-31.) However, any "circle" has resulted from their being permitted to relitigate the enforceability of the restriction in McDougal's permit. Respondents' action is barred under either the doctrine of res judicata or collateral estoppel.

B. The District Court Has Enjoined Enforcement of the Very Export Restriction Upheld by the State Supreme Court and It Therefore Violates 28 U.S.C. §2283.

The district court's injunction is said by Respondents to not violate the Anti-Injunction Act ("Act") because ". . . it runs *only* to County officials and not to California courts." (RB 33.) Respondents and McDougal further claim there is an absence of conflict between the federal injunction and the decision of the California Supreme Court.[5] They argue entitlement as third parties to mount a challenge in the federal court against the County's asserted "home embargo." (RB 35-39; AC 7-8.)

Said arguments are obviated by analysis of applicable facts and law.

Respondents' action sought to enjoin the County, certain of its officers *and the Superior Court* from enforcing the export restriction in McDougal's use permit. (1a-25a.) As actually issued, the district court's preliminary injunction enjoined the county and its officers. (B 12.) It is clear, however, a restraint against the parties rather than against

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[5]Respondents assert "[o]ur dual judicial system *is* operating without the presence of the conflicting orders between federal and state courts which 28 USC 2283 is designed to prevent. The California courts have recognized this by staying their proceedings pending decision on the federal questions." (RB 34-35.) And, McDougal likewise claims "[t]he trial court specifically stayed all contempt proceedings pending the decision of this court in the case at bar." (AC 7.)

the court itself does not avoid the prohibition of the Act. (see *Union Central Life Ins. Co. v. McAden, et al.*, 21 F. Supp. 110 (N.D. Tex. 1937) and later authorities discussed at PB 26.)

By its express terms, the federal injunction is intended to prevent enforcement of the same provision held enforceable by the California Supreme Court. The Act is designed to prevent just such interference. The Court stated in *Hill v. Martin*, 296 U.S. 393, 403 (1935):

> "The prohibition . . . is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court . . . It applies . . . not only to an execution issued on a judgment, but to *any proceeding supplemental or ancillary taken with a view of making the suit or judgment effective.*" (emphasis added.)

Respondents and McDougal indicate the state trial court "stayed" contempt proceedings pending determination by this Court. In fact, the Superior Court, after an evidentiary hearing, pronounced McDougal *in contempt* for "knowingly selling water from the well on the . . . premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico" and McDougal was ordered to cease selling water as so described. (D 2, 3.) Only execution of the contempt judgment has been stayed pending determination by this Court. (*Id.*)

In their mischaracterization of the status of matters between courts, Respondents have carefully avoided reference to cross-contempt proceedings commenced in the district court. After instructions were requested from the Superior Court and said Court issued an order to show cause why McDougal should not be held in contempt, Respondents commenced contempt proceedings in the district court

against the undersigned for assertedly having violated the court's preliminary injunction. [Refer to docket entries on May 1, 1978 and June 7, 1978 (iia, iiia).][6]

A direct and serious conflict exists between the state and federal trial courts exemplified by the state court's contempt judgment against McDougal. The confrontation has resulted from the district court's injunction in violation of the Act.

Respondents and McDougal rely on *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938) for the proposition third parties are ". . . not barred by the anti-injunction act from challenging a statute on federal constitutional grounds when the statute is also under litigation on the state court." (RB 37: AC 7-8.) *Hale* is sharply distinguishable from the present case.

Despite oft repeated claims they are challenging a "home embargo" imposed by the County, Respondents in reality *do not* attack any county ordinance or general policy preventing export of ground water. As shown, it is not alleged Respondents cannot purchase land and apply for entitlement to export water; nor can it be shown they are prevented from buying water for export from owners with proper zoning entitlement. (*supra.*) Instead, they seek to enjoin enforcement of the provision in McDougal's particular use permit, which was finally adjudicated as enforceable by the State Supreme Court.

The foregoing facts, and others, make *Hale v. Bimco Trading, Inc.* inapplicable. (Please refer to further argument at PB 27-28.) The principles announced in *Vendo v. Lectro-*

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[6]The date of the first above referenced docket entry is erroneously shown as May 1, 1977 in the Appendix. Following initiation of contempt proceedings against the undersigned on May 1, 1978, a "second petition for order to show cause why disobedient parties should not be punished for civil and/or criminal contempt" was filed against the members of the County's Board of Supervisors on May 19, 1978.

Vend Corporation, 433 U.S. 623 (1977) require reversal of the district court's injunction as violative of the Anti-Injunction Act.

II.

ENFORCEMENT OF THE SUBJECT EXPORT RESTRICTION IN NO WAY AFFECTS WATER MATTERS GOVERNED BY TREATY BETWEEN THE UNITED STATES AND MEXICO.

As shown, Respondents can acquire and export ground water from the "Clifford Well", but they desire to purchase water more cheaply from McDougal, whose well is located 8 miles nearer the international border. (RB 1-2.) It should be apparent Respondents and McDougal are conducting a private venture for economic gain. However, they attempt to disguise violation of the subject export restriction as somehow being in furtherance of obligations to Mexico.

Respondents allude to an asserted shortage of "safe and sanitary water" in Mexicali and a desire to transport water to ". . . compatriots in the Republic of Mexico who continue to suffer from the increasing salinization of the Colorado River." (RB 1, 35.) McDougal refers to "strained" relations between the United States and Mexico over increased salt content of Colorado River water and says the presidents of the respective countries ". . . resolved the problem, in part . . ." by agreeing Mexico would receive specified ground water. (AC 6-7.) He claims "[t]hese dislocations led to widespread resentment of the exportation of water to Mexico . . ." and "[t]he water involved here has become an international issue of some significance

. . ." (AC 7.)[7] These efforts to infer export of water from McDougal's well is necessary and tied to official international relations are a sham.

The Treaty of February 3, 1944, guarantees annual delivery of 1.5 million acre-feet of Colorado River water to Mexico. (Treaty Series, 994.) Indeed, increasing salinity of the river was a major international issue for many years. As a result of a June 1972 visit by the President of Mexico, in which he highlighted the problem in an address to Congress, the President of the United States appointed former Attorney General Brownell to seek a permanent solution. (Refer to legislative history of the "Colorado River Basin Salinity Control Act" in 2 U.S. Code Cong. & Admin. News, 1974, pp. 3327-3378.) An agreement between the two countries was memorialized as "Minute No. 242 of the

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[7]McDougal has submitted a resolution reportedly adopted by the "Commission of the Californias, a governmental advisory group of Mexicans and Californians . . .", which he describes as "calling for the continued exportation of water from McDougal Wells." (AC 7, Exh. C.) However, the resolution actually states, in part, ". . . at the meeting in La Paz, in April 1979, a Resolution was passed indicating support for the continued distribution of potable water to the City of Mexicali from Imperial County Wells" and "there is now pending before the U.S. Supreme Court the issue as to whether this distribution may continue." It resolves "[t]his Commission recognizes the importance of the availability of potable water to the City of Mexicali. To this purpose the Committee requests, if necessary, the intervention of the office of the Secretary of State of the United States in suport of an action pending in the United States Supreme Court (Case No. 79-1003) relative to the right of the Mexican Nationals to purchase water in the United States for use in the community of Mexicali."

Said resolution is nowhere contained in the record on appeal nor was it introduced in the state court proceedings in *McDougal*. The County was not notified of the meetings of the Commission at which described "resolutions" were adopted nor is the County aware of the information submitted in support thereof. It is submitted the language quoted mischaracterizes the present action and indicates the Commission may not have been in receipt of all facts. The County is further in receipt of information, which can be produced on request, indicating McDougal's counsel may have been a member of committees or sub-committees of the Commission which influenced adoption of said resolutions.

International Boundary and Water Commission." (*Id.*, pp. 3328-3330.) The terms of the agreement were implemented by passage of the Colorado River Basin Salinity Control Act by Congress. (43 U.S.C. §§1571-1578.)[8]

Nothing in the aforesaid "Minute" or Act requires or provides for the export operation being conducted by McDougal and the Respondents. Evidence produced in the state trial court proceedings obviated claims by McDougal that water from his well was needed in Mexico and that his export business was officially sanctioned.

A communication from an official of the International Boundary and Water Commission (Mexican Section), dated November 18, 1972, addressed the matter of well water imported from Imperial County for bottling in Mexicali, Baja California, and stated, in part:

> ". . . our Central Office has reported that this matter was studied by the Ministry of Foreign Relations of the Mexican Government and the United States Embassy in Mexico, whose representatives agreed that as the importation of water from Ocotillo was not indispensible for Mexicali, it should be out of the jurisdiction of our Commission and be considered as an economic matter of exportation-importation between private parties in Mexicali, Baja California & California, U.S., as well as the authorities of Imperial County."[9]

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[8]The Act provides for construction of a major desalting complex at Yuma, Arizona to reduce salinity of water delivered to Mexico and, among other things, authorized the Secretary of the Interior to construct, operate and maintain certain well fields to supplement water delivered to Mexico. (*Id.* §§1571, 1573.)

[9]Said letter addressed to Samuel Gallagher, a resident of a parcel adjoining McDougal's, from Eng. Eduardo Arguellas C., an officer of the Mexican Section of the International Boundary & Water Commission, was officially translated and received into evidence in the *McDougal* trial. A full copy of the translation, as introduced, is attached hereto as Exhibit "A".

Said letter noted a representative of the Public Utilities Commission of Baja California indicated ". . . the imported water represents a very small percentage of the total amount of water used in Mexicali . . ." and said official further advised water is available "in sufficient quantity to serve all of the City and Mexicali Valley necessities from wells under the control of [the Public Utilities Commission] . . ." (Exh. "A" attached.)

A letter addressed to the undersigned, and dated March 19, 1980, from the Office of the United States Section of the International Boundary and Water Commission confirms there is no "minute" of the Commission "governing the sale by private interests of ground water pumped from wells in the United States and sold to private interests in Mexicali." (Exh. "B" attached.)[10]

Obligations of the United States to deliver water to Mexico are governed by treaty and acts of Congress. Said laws do not require delivery of water from McDougal's well nor is such delivery necessary to meet needs in Mexicali.

III.

THE DISTRICT COURT ERRED IN REJECTING APPLICATION OF HUDSON COUNTY WATER CO. v. McCARTER.

Respondents assert the County has improperly "interjected" California water law as a means of "explaining

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[10]Said letter further refers to a meeting of the County's Board of Supervisors held on December 14, 1972 "to discuss whether curtailment of certain commercial water well operations near Ocotillo would jeopardize the health or welfare of residents of Mexicali" and indicates representatives of the U.S. and Mexican Sections of the International Boundary Commission attended only as "observers." During said meeting, a representative of Baja California indicated curtailment of shipments of Imperial County ground water would not create a shortage of drinking water in Mexicali and he further indicated ground water was available for development in the Mexicali Valley. The transcript of the hearing was introduced in the state court proceedings. Based on the aforesaid evidence, the Superior Court found "a satisfactory showing [was] made that the issuance of [a] preliminary injunction will not deprive Baja California of needed drinking water . . ." (26a-27a.)

away'' *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), aff'd 385 U.S. 35 (1966). (RB 16.) However, differences in water law provide a basis for reconciling the apparent conflict between the aforesaid case and *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), wherein the Court upheld a New Jersey statute preventing water from a local stream from being diverted outside the state.

The district court purported to distinguish *Hudson County Water Co.* based on water law and concluded said case was inapplicable because ''[r]iver water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well.'' (B 9.)

In *City of Altus, Oklahoma*, the Texas court likewise rejected application of *Hudson County Water Co.* by emphasizing absolute ownership rights acquired by an overlying owner under Texas' ''rule of capture.'' *City of Altus, Oklahoma v. Carr* (*supra*) at pp. 833, 840.) Said court analogized Texas ground water rights to those acquired in minerals and relied on *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), in striking down the subject Texas statute. (*Id.*)

The ''correlative rights'' doctrine applying to percolating ground water in California replaced the absolute ownership doctrine as observed in Texas. (see *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1903) and other authorities cited in PB 34-35; also please refer to Rogers and Nichols, *Water For California* (1967) pages 354-358.) In California, each overlying owner has a common right to reasonable beneficial use of water on the overlying land, along with similar rights of all other landowners overlying the same supply and such

a "correlative right" to percolating waters is similar to the riparian right to riparian waters. (*Id.*)

It is apparent the district court erred in rejecting application of *Hudson County Water Co.* on the rationale McDougal had unlimited property rights in the ground water basin. Under California law, his rights are limited in a fashion similar to those of a riparian owner.

Respondents have likewise failed to adequately distinguish *Hudson County Water Co.* They state:

> "Once McDougal has appropriated the water and is storing it it gains the same status as captured water in *Altus, supra*. This court's decision in *Hudson County Water Co., supra,* involved riparian rights and the ability to capture the water, not what may be done with it after it has been reduced to possession. The sale of water from storage tanks does not involve the same kind of state interests considered in the physical diversion of a river's cause of flow from one state to another as was the case in *Hudson County Water Co., supra.*" (RB 18.)

Respondents thus assert use of storage tanks somehow enhances an overlying owner's rights in a ground water basin. No authority is cited for such a proposition and, it is submitted, none exists. Further, a local government's interest in preventing pumped ground water from being exported by tank trucks (albeit the water may have been filled from a storage tank at the well) appears perfectly analogous to a state's interest in preventing "physical diversion" of a non-navigable stream. Respondents have failed to "explain away" *Hudson County Water Co. v. McCarter.*

As shown, the County believes Respondents' action is clearly barred by reason of the *McDougal* decision under the doctrine of res judicata and by terms of the Anti-Injunction Act. (*supra*). Assuming *arguendo* Respondents

have standing to prosecute the present action, *Hudson County Water Co. v. McCarter* provides an independent basis for upholding the enforceability of the subject export restriction.

IV.

IMPACT OF McDOUGAL'S EXPORT OF WATER FROM THE BASIN, WHILE NOT DIRECTLY AT ISSUE, IS A MATTER OF SERIOUS DISPUTE.

McDougal has attached a copy of an asserted "recent study by the California Water Resources Control Board" which he claims "shows that there is no danger to the water basin from McDOUGAL'S pumping." (AC 6, Exh. "B".) Review indicates the study, dated June 1980, was prepared by an associate engineering geologist apparently employed by said State Board. There is no showing the study has been endorsed or acted on by the Board.

Impact of McDougal's operation on the basin is not at issue before the Court and, if it were, the aforesaid study would not appropriately be considered since it is not in the record on appeal. Further, a comprehensive study of the ground water basin, completed in November 1977 by the United States Geological Survey and entitled "Digital-Model Evaluation of the Ground Water Resources in the Ocotillo-Coyote Wells Basin" ("U.S.G.S. Study"), which *is* a part of the record, reaches conclusions contrary to those of the study referenced by McDougal.[11]

The U.S.G.S. study recognized the basin encompasses about 300 square miles in western Imperial County and ground water therefrom is the *only* source of domestic and

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[11]The U.S.G.S. Study was filed with the district court on June 28, 1978 as Exhibit "B" to points and authorities supporting the County's unsuccessful second motion for stay of the Court's preliminary injunction.

industrial in the area. (U.S.G.S. Study p. 2.) Water in the basin moves from areas of recharge at the mountain fronts in western parts of the basin to areas of discharge across the "Elsinore fault" to the east and the Mexican border to the south. (*Id.* pp. 11-12.) Natural recharge is about 2,600 acre-feet per year and the basin is estimated to contain approximately 640,000 acre-feet in storage. (*Id.* p. 20.) There has been a steady state decline in the water level which has accelerated because of increased pumpage (*Id.* 2, 20.)[12] Said Elsinore fault transects the basin in a southeastern direction and separates potable ground water in the western part of the basin from very saline water to the east. (*Id.* pp. 16-17.)

The study concludes "[p]otential problems involve both the quantity of this supply and its quality." (U.S.G.S. Study p. 20.) Specifically, as of December 1975, estimated discharge exceeded recharge by about 500 acre feet per year. (*Id.* p. 35.) The U.S.G.S. stated "[t]his constitutes mining of the ground water; unless conditions change, water levels will continue to decline." (*Id.*) Finally, the study stated "[w]ith continued lowering of water levels around Ocotillo, the possibility exists for a reversal of direction of flow. If this occurs, saline ground water could flow westward across the fault and degrade the ground water in the Ocotillo area."

Based on the record before the Court, it cannot be concluded there is "no danger" to the basin from McDougal's

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[12]In 1975, the total pumpage from the basin was estimated at 880 acres feet annually, with export of water from the "Clifford Well" constituting 120 acre-feet annually. (*Id.* p. 20.)

pumpage.[13] To the contrary, curtailment of his current export, along with other measures, may be necessary to protect the basin.

V.

McDOUGAL'S BRIEF CONTAINS SCANDALOUS MATTER WHICH SHOULD BE DISREGARDED AND STRICKEN BY THE COURT.

In purporting to argue the need for "diversity jurisdiction," McDougal states:

> "Imperial County is relatively small and extremely conservative. The County contains definite anti-Mexican elements who may express themselves in judicial elections. Witness the recent election of . . . an avowed racist and leader of the Klu Klux Klan, as the Dem-

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[13]The study attached by McDougal refers to another report prepared by Dr. David Huntley in 1979. (AC Exh. C p. 15.) Dr. Huntley's report concluded:

"1) Water level data collected by the U.S. Geological Survey from October, 1976 to September, 1979 indicate that, even in years of above-average recharge, pumpage is in excess of the safe yield of the basin. Continued extraction of ground water at the current rate will result in saline water intrusion across the Elsinore fault unless effective ground water management plans are instituted. These ground water management plans could include; a) Artificial recharge. b) Restrictions on export of ground water. c) Redistribution of pumping centers. d) Establishment of pumping or injection barriers along the Elsinore fault.

2) Contours on the water table suggest that the possibility of saline water intrusion is greater than that suggested by [the U.S.G.S. Study].

3) Water budget calculations indicate that, in years of average precipitation, ground water recharge is from 870 to 1,672 acre-ft/yr, considerably less than the 2,600 acre-ft/yr computed by [the U.S.G.S. Study].

4) In years of average recharge, basin overdraft is from 1,608 to 2,410 acre-ft/yr, considerably more than the 500 acre-ft/yr estimated by [the U.S.G.S. Study].

5) Whereas the numerical model used by the [the U.S.G.S. Study] is qualitatively correct in its projection of the effects of overdraft, it is likely that it quantitatively underestimates the seriousness of the problem. Saline water intrusion is likely to occur sooner than [the U.S.G.S. Study] indicates, possibly as soon as 6-10 years."

ocratic nominee for the U.S. Congress in the 40th District, which includes Imperial County." (AC 9.)

Said attempt to attribute racism to the County and Superior Court is irresponsible & unprofessional. McDougal cannot show he did not receive a full and fair trial in the state courts.[13] The foregoing statements fall within the prohibition of Rule 34.6 of Rules of this Court requiring "[b]riefs must be . . . free from . . . scandalous matter." Pursuant to the proscription of the rule, the brief of McDougal should be disregarded and stricken by the Court.

CONCLUSION.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JAMES H. HARMON,
County Counsel,
Attorney for Petitioners.

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[13]Under California Code of Civil Procedure Section 394, McDougal was entitled to a change of venue or assignment of a disinterested judge from a neutral county for trial. The parties in fact stipulated to the assignment of the Hon. Andrew J. Eyman, an out-of-county Judge.

EXHIBIT A.

Comision Internacional de Limites y Aguas
Entre Mexico y Estados Unidos
Seccion Mexicana

(SEAL)

NUM. 826
EXP. X-594.1/18

ASUNTO: Importacion de agua de Ocotillo, California a Mexicali.

Mexicali, B.C., a 18 de noviembre de 1972.

SR. SAMUEL H. GALLAGHER,
P.O. Box 1393,
El Centro, California.

In regard to your communication dated November 1 of the present year, relating to well water that is being imported from the Ocotillo area in California for bottling in Mexicali, Baja, California, I wish to inform you that our Central Office has reported that this matter was studied by the Ministry of Foreign Relations of the Mexican Government and the United States Embassy in Mexico, whose representatives agreed that as the importation of water from Ocotillo was not indispensible for Mexicali, it should be out of the jurisdiction of our Commission and be considered as an economic matter of exportation-importation between private parties in Mexicali, Baja, California and California, U.S., as well as the authorities of Imperial County.

To obtain the data as to the necessity of water from Ocotillo for the residents of Mexicali, you should write (address yourself) to Engr. Leonel Vizcara Ojeda, General Manager of the State Commission of Public Utilities of Mexicali, who has informed this office that the imported water represents a very small percentage of the total amount of water used in Mexicali, the consumption for 1972 being

estimated at 99,854,800 liters (quarts + or −) per day while the importation only reaches 378,000 liters per day. Engr. V carra has offered, as published in the local press, water in sufficient quantity to serve all the City and Mexicali Valley necessities from wells under the control of said office and of a quality estimated to be superior to water from Ocotillo.

Also, you can address yourself directly to Engr. Roberto Mazon Noriega, Mayor of Mexicali, on the necessity of importing water from the United States. Verbally, this executive informed Engr. Alfonso Castro Reyes, of our office, that there are sufficient wells in the Mexicali Valley to supply the needs of bottled water for the City and Mexicali Valley, indicating that the only interest the City has was in avoiding a price raise of bottled water, which even at actual prices can not be bought by the majority of the population of Mexicali.

The total amount of water that the Health Department estimates is bottled daily in the 43 plants in Mexicali is as much as 860,000 liters per day, of which 378,000 bottles are from Ocotillo, resulting in 482,000 liters per day from the wells in the Valley (Mexicali).

Atentamente
El Jefe De La Oficina

Eng. Eduardo Arguelles C.

EXHIBIT B.

International Boundary and Water Commission
United States and Mexico
IBWC Building
4110 Rio Bravo
El Paso, Texas 79902

MAR. 19, 1980

Honorable James H. Harmon
County Counsel
County of Imperial
939 W. Main Street
El Centro, California 92243

Dear Mr. Harmon:

Per our telephone conversation, I am pleased to provide the following information:

1) A meeting of the Board of Supervisors was held on December 14, 1972 to discuss whether curtailment of certain commercial water well operations near Ocotillo would jeopardize the health or welfare of residents of Mexicali. Engineer Willard Ericson of the United States Section and Engineer Eduardo Arguelles of the Mexican Section attended, only as observers;
2) There is no Minute of the International Boundary and Water Commission governing the sale by private interests of ground water pumped from wells in the United States and sold to private interests in Mexicali;
3) The 1944 Treaty may be cited as "Treaty Between the United States of America and Mexico relating

to Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Treaty Series 994''.

If we may provide further information, please advise.

Sincerely,

Frank B. Walker
Chief, Real Estate Division

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, and its BOARD OF SUPERVISORS, OFFICERS, AGENTS and EMPLOYEES,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' REPLY BRIEF.

WILLIAM H. KRONBERGER, JR.,
1007 Fifth Avenue, Suite 1100,
San Diego, Calif. 92101,
(714) 231-8491,
Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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I.

THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL IS NOT A PARTY TO THE WITHIN ACTION.

Petitioners in attempting to build up the alleged "conflict" between the federal system and the state system have erroneously captioned the pleadings in such a manner as to infer that the superior court of California in and for the County of Imperial is a petitioner and party. Nothing can be further from the truth. The notice of appeal set forth at

page 126-A of the appendix clearly reveals that the petitioners are the *County of Imperial, and its board of supervisors, officers, agents and employees*. The superior court was not a party to the appeal to the United States Court of Appeals for the Ninth Circuit nor could it possibly be a petitioner before this court. Lest there be any implication that a state court stands before the United States Supreme Court seeking the protection afforded by 28 USC 2283 let it be now dispelled. Respondents herein request that this court order stricken all references to the Superior Court of California in and for the County of Imperial as a petitioner and that the records of the court be amended to reflect the actual identity of the petitioners.

II.

THERE IS NO CONFLICT BETWEEN THE FEDERAL DISTRICT COURT AND THE CALIFORNIA STATE COURTS.

Respondents feel constrained to comment upon the "direct and serious conflict" petitioners allege exists between the state and federal trial courts as exemplified by the state court's contempt judgment against McDougal. (Reply Brief Page 7). It is patently clear from both the order of contempt itself (D 1-4)[1] and the orders of the fourth appellate district, for the State of California (Exhibit A, Amicus Curiae Brief) that the entire question of McDougal's contempt has been stayed awaiting the decision of this court on the constitutional issues presented.

Petitioners seek to avoid this by advising the court that respondents have sought a contempt order against both the County of Imperial and its attorney. Respondents have in-

---

[1]The order or contempt is set forth in the Petition for Certiorari as Appendix D. Citations hereafter will be to Appendix "D."

deed sought to hold counsel for petitioners in contempt for what respondents believe to be a clear violation on his part of his duties in light of the decision of the federal district court. The federal district court has taken no action on respondents' petitions relative to that alleged contempt. Respondents believe that the California Superior Court's contempt order simply reflects a desire on the County of Imperial's part to manufacture an alleged conflict between the state and federal courts for purposes of argument on appeal with respect to the issues presented by 28 USC 2283. Respondents note that the federal district court's preliminary injunction was entered on August 29, 1977 (B-12)[2] and that it was not until March 6, 1979 (D 1-2) that a judgment of contempt was entered against McDougal, a full year and six months after the entry of the preliminary injunction (it should also be noted that but for the instant interlocutory appeal the trial was scheduled for January 10, 1978 [see Clerk's Transcript P. 249] one year and seven weeks prior to the time the superior court felt compelled to enter its contempt judgment). The trial court was long aware of the district court's order and respondents doubt that it would have acted, even in the limited manner it did, but for counsel's persistence in creating a conflict to argue.

Whether counsel for the County of Imperial violated the order entered against him or whether the Superior Court for the County of Imperial, State of California acted on its own as a part of its continuing proceedings in the state action (including the County's nuisance actions heard on February 16, 1978) is irrelevant to the basic premise. The basic fact remains: the state courts have deferred to the federal courts on the Constitutional issue now pending before this court.

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[2]The district court's preliminary injunction is set forth in the Petition for Certiorari as Appendix "B."

The state superior court's contempt order specifically provides that the order requiring McDougal to cease selling the water for export is stayed for a period of thirty (30) days from the entry of a judgment by the United States Court of Appeals for the Ninth Circuit in favor of the County or in the alternative until a final determination by this court (D-3).

That respondents believe petitioners sought to buttress their arguments a year and one-half after the injunction does not alter the outcome. If petitioners are correct, as they alleged in their response and opposition to petitioner for an order to show cause re contempt, that the superior court commenced proceedings of its own volition, then respondents' argument here that the state superior court was not enjoined by the federal district court's order is established beyond doubt. Petitioners argue below that the superior court acted on its own and respondents here assert it was free to do so. No violation of 28 USC 2283 therefore exists.

If respondents are correct in their views that the superior court acted only in response to petitioners' efforts to contempt McDougal, the argument made here is even further reinforced for the superior court's limited stay proves the point. If the contempt resulted from the County of Imperial's insistence, then the superior court pacified the County while at the same time recognizing the appropriateness of a final federal decision on the Constitutional question before it proceeded with enforcing its orders against McDougal.

There is simply no conflict between the two systems. California's courts, like those of Florida in *Hale v. Bimco, Trading Co., Inc.*, 306 U.S. 375 (1938) await this court's disposition of a federal Constitutional question.

III.

THE COUNTY OF IMPERIAL IS BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL FROM ASSERTING THAT THE EXPORT RESTRICTION IS AN ALLOCATION AMONG USERS OR A LAND USE REGULATION.

Petitioners have made much of the prior litigation it engaged in with its co-defendant McDougal, yet the fact is simply that the only parties bound in its proceeding are the petitioners. They are bound by the California Supreme Court's ruling in *County of Imperial v. McDougal*, 19 Cal.3d 505 (1977) (C 1-11) that "the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the County." (C-9).

Amicus curiae and petitioners have managed to muddy the waters upon which the issues before this court float by injecting reams of material concerning the potential for overdraft in the water basin. Questions of water quality and quantity are simply not relevant to the inquiry before this honorable court. Amicus curiae's Exhibit "B" and petitioners recitation of conclusions of David Huntley (RB-16) (not to mention other extraneous letters from other unknowns outside the record such as Sam Gallagher) serve only to point out the truth of what petitioners have maintained all along: an adequate state forum and appropriate state statutory procedures exist in which defendants may dispute the impact of McDougal's operation on the ground water basin without simply banning transportation of water outside of the County. The cited materials reveal that the County and McDougal are engaged in a spirited debate before the Regional Water Quality Control Board, Colorado River Basin and the State Water Resources Control Board

relative to dangers, if any (see conclusions Amicus Curiae brief, Exhibit A 21-22), from operation of McDougal wells.

The fact that these proceedings are taking place reinforces the basic relationship between the holdings in *County of Imperial v. McDougal, supra*, to which the County is bound, and the appropriateness of the U.S. District Court of Appeals instruction that the commerce issue be decided in light of *Hughes v. Oklahoma*, 441 U.S. 322 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979). The conditional use permit restriction represents the County of Imperial's export policy and not some esoteric land use consideration or desire to apportion use among overlying land owners. The County is bound by the California Supreme Court holding that it is simply employing an export ban and all of the letters from and to various individuals and hypertechnical ground water reports found in petitioners' reply brief and amicus curiae's brief serve only to avoid the real issue — may the County impose an outright ban on export? The answer must be no.

IV.

CALIFORNIA'S DOCTRINE OF CORRELATIVE RIGHTS AFFORDS THE COUNTY OF IMPERIAL NO DEFENSE TO ITS HOME EMBARGO.

California's Correlative Rights Doctrine will not serve as a basis for rejecting this court's analysis in *Hughes v. Oklahoma*, 441 U.S. 322 (1979) in favor of the analysis in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). California's Correlative Rights Doctrine does not render the analysis of this court in *Hudson County Water Co., supra*, and *Hughes v. Oklahoma, supra*, inconsistent nor does it afford the County a basis from which it may pose a ban upon the transportation and use of water once it has been appropriated.

"Correlative rights" is a word of art meaning simply that Californians who own land over a ground water basin may obtain a certain share of that water for their own use and/or export in accordance with a court ordered apportionment formula.

It represents California's efforts in the heyday of gold mining and cattle ranching to strike a balance between the competing interests of miners who requested export water for mining purposes and cattle barons who needed to irrigate land and water their stock. The doctrine represents a subtle blending of two opposing views as to water rights, riparian and appropriative. California's doctrine thus recognizes two diametrically opposed rights in the same underground water basin.

Allocation of water among overlying owners represents a proper exercise of the police power as did the State of New Jersey's efforts in maintaining the free flow of a river wholly within its boundaries in *Hudson County Water Co. v. McCarter, supra*. The first question presented in any Commerce Clause case is whether or not the regulation is intended to regulate interstate and foreign commerce or whether it is to further some other legitimate local police purpose. This question is reflected in *Hudson County Water Co., supra*, where the court clearly understood that the prevention of diversion of a river wholly within one state to another state was a proper public purpose. Unlike the factual situation in *Hudson County Water Co., supra*, the County of Imperial had no such legitimate public purpose as specifically enunciated by the California Supreme Court in *County of Imperial v. McDougal,* (C 1-10) where the court held that regulation was simply a ban to prevent export. The ban in question is not designed to protect the free flow of a river or even to assure the integrity of the ground water basin since it in no way restricts appropriation of

water within the basin but simply regulates the transportation and use of the water after it has been withdrawn from the well. Nor is it a zoning regulation designed to regulate land use as the County of Imperial argued from 1972 through 1977 when that notion was rejected by the California Supreme Court in *County of Imperial v. McDougal,* (See 8-9). The County of Imperial's newly found public purpose of allocation of use among overlying owners eight years later is of no assistance to it in its search for a legitimate public purpose, for none exists. It is simply an effort by the County of Imperial to ban the export of water and nothing more. It represents the County of Imperial's foreign policy.

If, in a Commerce Clause conflict between local and national interests, it is determined that a legitimate local police power question is involved, such as was present in *Hudson County Water Co., supra,* the court is then faced with the question of whether or not the regulation is a reasonable one. The court's inquiry in *Hughes v. Oklahoma, supra,* focuses in on the second aspect of that analysis; As this court plainly observed where a facial prohibition against commerce is involved the strictest scrutiny will be applied to determine whether or not the least discriminatory method of regulation has been employed. *Hughes v. Oklahoma, supra,* at 336-337. As pointed out earlier, *Hudson County Water Co., Supra,* involved a legitimate state interest, whereas no such local interest is served by the regulation imposed by petitioners. Assuming arguendo, however, that an export ban unrelated to conservation of water serves a legitimate local interest, the ban must fall under the test described in *Hughes v. Oklahoma, supra,* as being the most discriminatory, while at the same time the least effective, method available to accomplish the public purpose. In *Hudson County Water Co., supra,* probably the most effective, if not the only, method to keep a river flowing wholly within

a state's border is to prevent its diversion. It is patently clear however that the most effective method of regulating the use of ground water among overlying users is not an export ban. Were California's Correlative Rights Doctrine applied to the case at hand a means directly related to the end would be employed: a limitation on pumping to fairly allocate a resource among overlying users. Unfortunately, the restriction at hand is not one designed to protect the rights of overlying owners but is simply a ban against the transportation and use of water. As *Hughes v. Oklahoma, supra*, teaches us regulations which effect commerce must be designed in accordance with the least discriminatory alternative. It is inappropriate to urge California's Correlative Rights Doctrine, a doctrine essentially regulating quantities of appropriation, in defense of the most discriminatory alternative available, an export ban which simply effects product destination in a manner unrelated to the quantity of appropriation.

The County of Imperial's foreign trade policy must fall of its own weight.

V.

THE COUNTY OF IMPERIAL MAY NOT REGULATE FOREIGN COMMERCE THROUGH THE CONDITIONAL USE PERMIT PROCESS.

Petitioners seem to argue that since the export restriction is found in a conditional use permit rather than as a part of an overall County ordinance, it is somehow outside of the purview of the Commerce Clause. Regulation of interstate and foreign commerce is simply not a part of the County's zoning powers. Zoning may legitimately have an indirect impact on interstate and foreign commerce by the very nature of the process which dictates which businesses may be conducted in which location of the community and under

what circumstances said businesses might operate. Again, it must be remembered that as the California Supreme Court said in *County of Imperial v. McDougal, supra*, the regulation in question has nothing to do with the enforcement of the County's zoning powers, it is simply a ban against export.

It is the ban against export which is at issue here, not whether or not that ban is effectuated through a conditional use permit process or through a county wide statute.

Respondents are a little unsure from the standpoint of the Commerce Clause as to which would be worse, the County's ability to prohibit specific export or its ability to prohibit all export. Certainly the prohibition of all export on its face would seem to be worse but then again as petitioners point out in their briefs (RB 4), the County is in a position of creating a monopoly and enforcing pricing practices if it can ban the export of water from one well and not another for reasons totally unrelated to land use regulation. Petitioners' protestations to the effect that respondents might purchase water from other land owners with a proper "zoning entitlement"[3] is of no merit since it assumes that the County might grant "proper zoning entitlements" to those well owners who the County believes should operate in the interstate and foreign commerce.

---

[3]It is ironic that the County of Imperial attempts to bolster its argument by noting that respondents could purchase water at the Clifford Well (RB 4), the only other well available to respondents in Imperial County. The irony rests on the fact that on May 27, 1980, the Imperial County Board of Supervisors pursuant to the County's zoning ordinance ordered that the Clifford Well be closed by 1986 as a non-conforming use. It is readily apparent to these respondents that the County is using every means at its disposal to absolutely and flatly cut off the traffic of water in interstate and foreign commerce. The County should not be permitted to argue that respondents could purchase water from a well that the County is aggressively trying to close.

The restriction is not a zoning entitlement as noted by the California Supreme Court in *County of Imperial v. McDougal, supra*. That someone else might not be precluded from selling water to respondents is not an answer to the fact that the County has, for reasons unrelated to zoning or water conservation, unlawfully and in contravention of the United States Constitution interfered with interstate and foreign commerce by absolutely and flatly banning it. The argument that the County is not enforcing an unconstitutional *law* but is simply enforcing an unconstitutional *condition* will not save the County's home embargo from the fate it so justly deserves.

VI.

RESPONDENTS ARE STRANGERS TO THE PRIOR PROCEEDINGS IN THE CALIFORNIA COURTS.

Petitioners continue to allege that respondents are somehow bound to the results of the state proceedings since they are "contractors of McDougal." (Reply Brief 4) Nowhere in the record before this court in the pleadings or in fact can it be said that Messrs. Martinez and DeLeon are contractors of McDougal or have any contractual privity with him whatsoever. The only party with a contract with McDougal is Guillermo Gallego Munoz who, in the second cause of action, seeks specific performance.

Conclusion.

Judgment of the court of appeal should be affirmed.

Respectfully submitted,

WILLIAM H. KRONBERGER, JR.,

Attorney for Respondents.

Supreme Court, U. S.
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AMICUS CURIAE BRIEF.

DONALD MCDOUGAL, JR.,
1010 Second Avenue, Suite 2300,
San Diego, Calif. 92101,
(714) 238-1124,
Attorneys for Amicus Curiae,
Donald C. McDougal.

Of counsel,
DAVID A. KAY.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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AMICUS CURIAE BRIEF.

STATEMENT OF THE CASE.

A Short History of Imperial County v. McDougal.

In 1967 W. ERLE SIMPSON owned the water well which is the subject of the current litigation. SIMPSON applied for a use permit to allow commercial sales of water from a well on the property. (*County of Imperial v. McDougal* (1977) 19 Cal. 3d 505, reprinted as Appendix "C" to the County's Petition for Writ of Certiorari and hereinafter referred to as *McDougal*).

The subdivision in which SIMPSON's land was located consisted of 16 10-acre parcels. Public hearings were held on SIMPSON'S application by the Planning Commission but were put over until a joint meeting of the Planning Commission and the Board of Supervisors could be held to formulate a "Water Exportation Policy" for the County. (McDougal, C-8).

That hearing was held in September of 1967 and members of both bodies expressed concern over the amount of water being exported from the county to Mexico. SIMPSON agreed to withdraw his request to sell water to Mexico and he was issued a permit for the commercial sale of water upon condition that "water not be sold for use outside Imperial County".

Although the County attempted later to claim that other considerations besides its "water export" policy were factors in the granting of the permit, the California Supreme Court rejected these contentions and held:

> "Under these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, i.e. a prohibition against exporting water from the County." (*McDougal*, C-9),

SIMPSON did not challenge the permit, but abided by its conditions until he sold the well to McDOUGAL, in 1977.

Upon purchasing the well, McDOUGAL began to sell water to all purchasers without regard to where they intended to use it. Business increased substantially because of the need of Mexican water bottlers for the water.

In October of 1972, the County brought an action to restrain McDOUGAL from selling water to those who would use it outside of the County. In addition, the County claimed in separate causes of action that McDOUGAL's operation

was a public nuisance and that McDOUGAL was violating the County's ground water appropriation ordinance.

After evidence was presented, the trial court, ANDREW J. EYMAN, entered an order prohibiting McDOUGAL from violating the condition in his conditional use permit barring sale for export. In addition, Judge EYMAN found that McDOUGAL's operation violated a Zoning ordinance of the County and that the condition in the permit was designed to regulate local land use and had only an incidental effect on interstate and foreign commerce.

After vacating an opinion by an intermediate appellate court, the California Supreme Court granted a hearing.

The California Supreme Court rejected all of the findings of the trial court relating to the purpose of the condition in the use permit and its validity under the Commerce Clause. The Court upheld the restriction, however, on the narrow ground that since SIMPSON did not challenge the validity of the condition, McDOUGAL, standing in SIMPSON's shoes, could not do so either.

> "Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the County is invalid, and he is bound by this limitation[3]." (*McDougal*, C-6).

In the above-mentioned footnote 3, the California Supreme Court explains that it has made no finding regarding whether the prohibition against the export of water was valid.

> "In view of this conclusion[,] we need not decide whether the prohibition against the export of water was valid. (See *City of Altus Oklahoma v. Carr* (W.D. Tex. 1966) 255 F. Supp. 828 . . ." (*McDougal*, C-6).

McDOUGAL's appeal to the U. S. Supreme Court was dismissed for lack of a substantial federal question. (434 U.S. 899).

The decision of the California Supreme Court also remanded the case to the trial court to make appropriate findings on the nuisance aspect of the case which had been considered moot on the first trial.

In conformance with the ruling of the California Supreme Court, McDOUGAL erected signs at the water well site proclaiming that water would henceforth only be sold to those who could prove that they would use the water in Imperial County.

On June 15, 1977, Mexican water buyers MUNOZ, MARTINEZ, and DE LEON approached the property tendering money to McDOUGAL for purchase of water. McDOUGAL requested that Mexican water buyers execute affidavits that stated they would use the water in Imperial County. They refused to do so. McDOUGAL then refused to sell water to them based upon the condition in his permit.

On June 19, 1977, the dissatisfied Mexican water buyers brought suit in Federal Court to enjoin enforcement of the unconstitutional condition. Reasoning that the California Supreme Court's judgment simply estopped McDOUGAL from challenging the condition, the Mexican buyers saw no reason why *they* should be estopped from challenging the unconstitutional condition in the case at bar.

On August 29, 1977, the Federal District Court issued a preliminary injunction enjoining the County of Imperial and its supervisors, and their agents and employees, from enforcing the condition in McDOUGAL's use permit which prohibits the sale of water for use outside Imperial County. (B-12).

McDOUGAL then proceeded to sell water to any purchasers regardless of where they intended to use it.

On May 1, 1978, the County requested that McDOUGAL be held in contempt in State Court for failure to abide by

the condition in his permit restricting his sales to those who would use the water in Imperial County. On March 5, 1979, the Imperial County trial court held McDOUGAL in contempt but stayed any sanctions until the final determination of the appeal in the Federal case. (D-3).

McDOUGAL filed a Writ of Certiorari challenging the contempt judgment with the California Court of Appeal, Fourth Appellate District, Division 1. That court has taken the Writ under submission and is awaiting a final determination of the federal appeal before it acts (Exhibit "A").

Pursuant to the California Supreme Court decision the County reinstituted the public nuisance portion of the State Court suit. On May 12, 1978, at the County's request, the trial court entered judgment on the nuisance cause of action based solely on the evidence taken at the original hearing five years before.

The California Court of Appeal reversed that judgment on the basis that new evidence should have been allowed concerning the current condition of the well.

The issue of public nuisance is now pending before the Superior Court of Imperial County.

I.

No Legitimate Land Use or Water Conservation Purposes Are Served by the Unconstitutional Condition in the Case at Bar.

The County, by reference to *Hudson County Water Co. v. McCarter* (1908) 209 U.S. 349, now implies that the purpose of the condition in the use permit limiting sales to those who would use the water in Imperial County is somehow related to the police power of the state to conserve water or regulate land use. (Petitioner's Brief, p. 30). This position has been clearly repudiated by the Supreme Court

of California in its reversal of the Trial Court's findings in *County of Imperial v. McDougal* (1977) 19 Cal. 3d 505.

Unlike the Mexican water purchasers in the case at bar, the County *was* a party to the McDOUGAL case and is bound by the concepts of collateral estoppel from challenging the findings of the California Supreme Court in *County of Imperial v. McDougal, supra.*

As the California Supreme Court noted, there is no limitation on the amount of water McDougal can sell and there is no limitation on the number of trucks aside from local nuisance laws. (McDOUGAL, C-8).

In other words, McDOUGAL is free to sell as much water as he wishes to anyone for commercial purposes so long as he does not sell it to those who would use it outside the County.

A recent study by the California State Water Resources Control Board shows that there is no danger to the water basin from McDOUGAL's pumping. Said study is attached hereto as Exhibit "B")

If water conservation and land use regulation are not the real purposes for the restriction, there remains only one logical explanation; the restriction is designed to prohibit water from being shipped to Mexico for other political purposes. *The County is attempting to write and enforce its own foreign policy towards Mexico.*

County of Imperial v. McDougal, supra, was originally filed by the County in 1972. At that time, relations between the United States and Mexico had been strained by the fact that the Wellton - Mohawk Project had increased the salt content of the water Mexico was receiving to unacceptable levels. Presidents Nixon and Echeverria resolved the problem, in part by agreeing that Mexico would receive 41,000

acre feet of water from above the Imperial Dam and 32,000 acre feet of water from Yuma Mesa Wells in Arizona.

These dislocations led to widespread resentment of the exportation of water to Mexico and have fueled the fires of the anti exportation movement.

Obviously, counties may not be allowed to interfere in the foreign relations of the United States with Mexico. The water involved here has become an international issue of some significance as evidenced by the Resolution of the Commission of the Californias, a governmental advisory group of Mexicans and Californians, calling for the continued exportation of water from McDOUGAL Wells. Said resolution is attached hereto as Exhibit "C".

II.

Hale v. Bimco Is Controlling in the Case at Bar.

Petitioner's argument that relief by the Federal District Court is barred by 22 U.S.C. 2283 is refuted by *Hale v. Bimco Trading Co., Inc.* (1939) 306 U.S. 375.

Although the Supreme Court of Florida in *Hale* actually ruled on the Federal issue involved while the California Supreme Court has sidestepped it, the factual situations are otherwise identical.

Petitioner claims that California Courts have not deferred to the Federal Courts on the issue involved as the Florida Courts did in *Hale*. This is not the case.

The California Supreme Court specifically refused to find whether or not the restriction in the permit was unconstitutional. (C-6).

The Trial Court specifically stayed all contempt proceedings pending the decision of this Court in the case at bar. (D-2).

The California Court of Appeal, Fourth Appellate District, Division 1, has also taken the issue of contempt under submission pending the outcome of the case at bar before the United States Supreme Court. See Order attached hereto as Exhibit "A".

In other words, every single level of the California Court system is awaiting the decision of this Court on the federal issue. There is no conflict whatsoever between the State and Federal Courts. No concepts of federalism are violated by the District Court injunction. The only party claiming to be injured by the injunction is the County of Imperial. The court system of California not only expects but is actually waiting upon a determination by the Federal Court of whether or not the condition is unconstitutional.

Hale v. Bimco is controlling and the Mexican water buyers should be allowed their day in Court.

III.

Barring the Injunction Below Would Only Defeat Diversity Jurisdiction Where It Is Clearly Necessary.

To this point in time a clearly unconstitutional condition has been allowed to stand despite persistent challenge by various parties for a period of eight years.

If the Mexican water buyers are forced to go into State Court because of the Court's interpretation of 22 U.S.C. 2283, this will accomplish only two goals. First, it will delay a determination of the constitutionality of the condition for a number of years. Second, it will deprive the Mexican water purchasers of the impartial forum guaranteed to them by diversity jurisdiction.

Even should the case be transferred to the State Court, the issue of whether this clearly unconstitutional condition

may be enforced will surface in this Court at some later date. It is only a matter of time.

Depriving the Mexican water purchasers of an impartial Federal forum guaranteed to them through diversity jurisdiction is a more serious matter. If ever diversity jurisidiction was needed, it is in Imperial county.

Imperial County is relatively small and extremely conservative. The County contains definite anti-Mexican elements who may express themselves in judicial elections. Witness the recent election of THOMAS METZGER, an avowed racist and leader of the Klu Klux Klan, as the Democratic nominee for the U.S. Congress in the 40th District, which includes Imperial County.

It is precisely this type of local pressure which diversity jurisdiction was designed to negate. *Moore's Federal Practice*, Section 0.71, p. 701.10 - 707.

The interpretation of 22 U.S.C. 2283 urged by the Petitioner would effectively defeat diversity jurisdiction of the Federal Courts wherever a State Court had issued any type of prior ruling in a related case, even where it was not on the constitutional issue presented. Such a result would defeat one of the primary purposes of an independent federal judiciary and should not be sanctioned by this Court.

Conclusion.

The County of Imperial has, through the use of a condition limiting water export, attempted to formulate and enforce its own foreign policy toward Mexico. Enforcement of this clearly unconstitutional condition was properly enjoined by the Federal District Court. There is no conflict between the judgment in the case at bar and the State Court Judgment. In fact, the California Courts are expressly waiting for a

decision by the Federal Courts concerning the constitutional issue. To overturn the injunction as requested by the County would deprive the Mexican water purchasers of an impartial federal forum guaranteed to them by diversity jurisdiction.

Respectfully submitted,

DAVID A. KAY,
DONALD C. MCDOUGAL, JR.,
Attorneys for Amicus
Donald C. McDougal.

EXHIBIT "A".

Fourth Appellate District, 4 CIV. 18915, Imperial County, Superior Court No. 43353.

Donald C. McDougal, Petitioner, v. Superior Court, Etc., County of Imperial, Respondent, County of Imperial, Real party in interest.

Donald C. McDougal, David A. Kay, 1010 Second Ave., Suite 2300, San Diego, Ca. 92101. James Harmon, County Counsel, Courthouse, El Centro, 92243.

1979, May 8. Filed petition for writ of Certiorari/Prohibition with stay pending review. #0275. $50.

June 5. Respondent and real party in interest are ordered to show cause before this court why the relief prayed for should not be granted. Written returns may be served and filed by respondent or real party in interest on or before June 15, 1979. Petitioner may reply by June 25, 1979.

This case is consolidated with case no. 4 Civil 18766 and case no. 4 Civil 18248 for oral argument to be held at 1350 Front St., Room 6010 State Building, San Diego, California at 1:30 p.m. on July 10, 1979.

Enforcement of the judgment of contempt entered on March 6, 1979, in case number 43353 is stayed until further order of this court.

June 15. Filed oppositon to petition by RPI.

June 25. Filed reply to opposition to petition.

July 10, 1979. Argued and Submitted.

July 19. The submission of the above matter is vacated, to await the finality of Munoz v. County of Imperial, U.S.D.C. #77-491-T, in the federal court.

EXHIBIT "B".

OCOTILLO-COYOTE WELLS GROUNDWATER QUANTITY-QUALITY STUDY IMPERIAL COUNTY, CALIFORNIA

By

Richard J. Zipp
Associate Engineering Geologist
Division of Planning and Research
State Water Resources Control Board

JUNE 1980

ABSTRACT

The study of the Ocotillo-Coyote Wells Groundwater Basin was conducted to determine the effect that current and/or future groundwater extractions would have on water quality and quantity in the basin. Historical water quality and level data combined with published reports on the area were reviewed. This information along with additional water levels and quality samples provided the data base for the study and conclusions reached.

The basin was found not to be in overdraft. Several localized pumping depressions have been generated in the major extraction areas. They are neither deep enough nor extensive enough at this time to cause a serious degradation of groundwater quality.

Minor degradation from shallow poor quality water was detected in several wells. The current beneficial uses should not be affected by this degradation. Dilution with the deeper waters will keep the quality well within limits.

INTRODUCTION

The Regional Water Quality Control Board, Colorado River Basin, at its January 23, 1980 Board meeting requested the State Water Resources Control Board to determine if a groundwater quality/quantity problem exists in the Coyote Wells Hydrologic Subunit (Figure 1).

The specific request asked the State Board to:

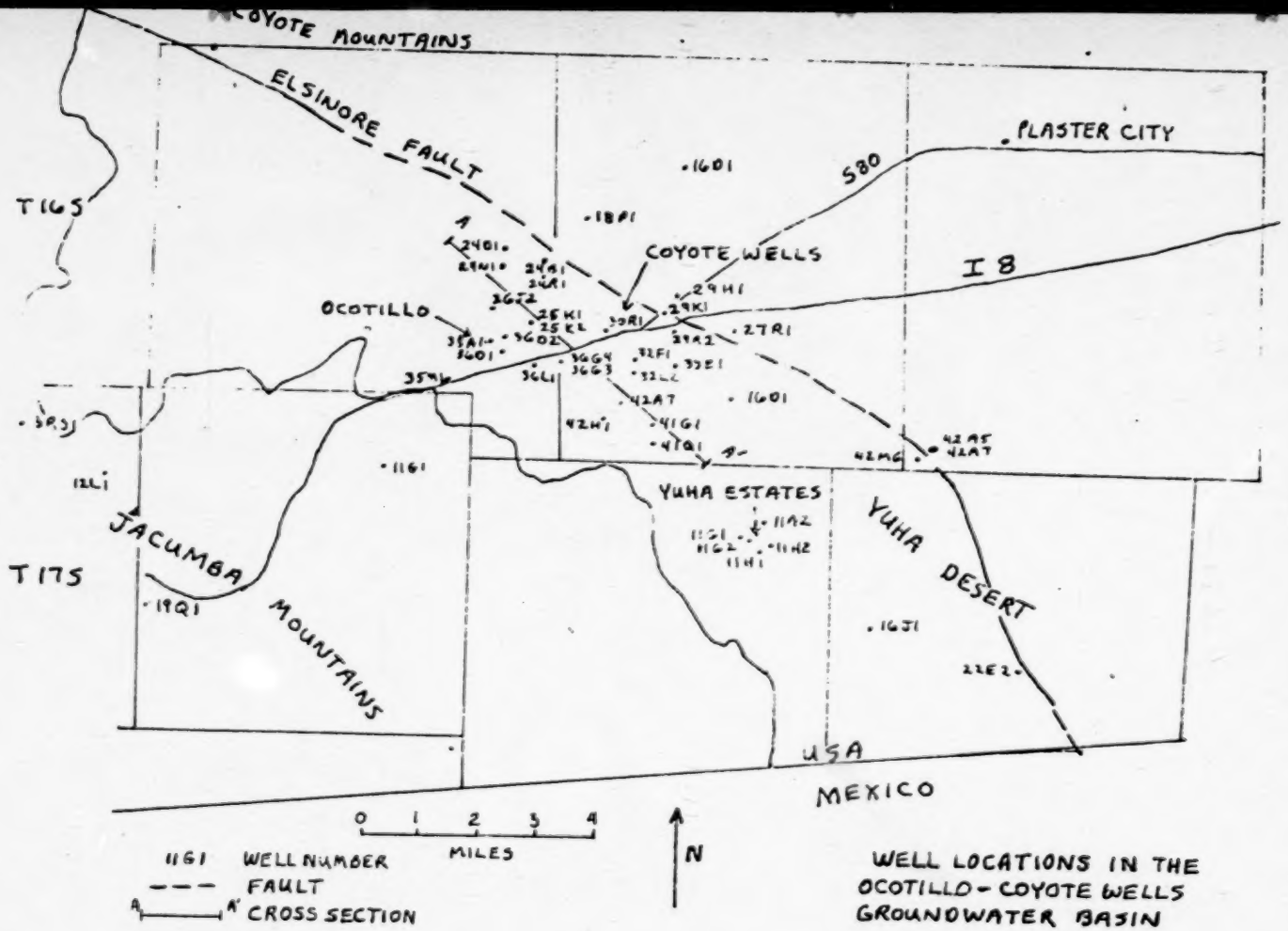
1. Investigate this water quality-quantity issue pursuant to Section 2100 of Division 2 of the California Water Code and take appropriate action such as filing a court action to restrict pumping or to impose physical solutions, or both, to the extent necessary.
2. Provide adequate funds for the construction and monitoring of five observation wells as recommended by

the U. S. Geological Survey (USGS) and the Department of Water Resources (DWR). The revised estimated total cost of construction of the five proposed wells is $200,000.* The total monitoring costs are estimated at $2,000* annually.

*Estimate presented in USGS/DWR November 26, 1979 letter to Regional Board 7.

3. Take other appropriate actions to resolve this water quality-quantity issue at the earliest possible date, in addition to the above-listed proposed actions.

The study was initiated in February 1980 and included the compilation of existing data from all sources plus collection of new water level and quality data. An analysis of the basic data in conjunction with the review of existing hydrologic reports provided the information necessary to make reasonable conclusions.



WELL LOCATIONS IN THE OCOTILLO - COYOTE WELLS GROUNDWATER BASIN

FIGURE 1

HYDROLOGY

The Ocotillo-Coyote Wells groundwater basin consists of one unconfined aquifer system. The groundwater flows in a south-easterly direction with some underflow across the Elsinore fault and the remaining underflow south across the Mexican border, a political rather than a physical boundary.

Skrivan (1977) estimated total storage in the upper 200 feet of saturated section at 640,000 ac-ft. DWR (Bull 118, 1975) using a section from 100-300 feet thick estimated storage at 1,700,000 ac-ft. The Division of Oil and Gas records show the base of freshwater at 515 feet in the southern portion of the basin (S22, T17S, R11E). This implies that a greater quantity is in storage. No calculation was made of the amount.

Aquifer characteristics in the basin were calibrated by Skrivan (1977). Transmissivity values ranged from 20 to 10,000 feet squared per day (approximately 100-70,000 gal/day/ft.) Transmissivity is the rate water passes through a material. The values calibrated by Skrivan are not unrealistic for the geology present.

The storage coefficients were also calibrated by Skrivan's model. To fit the imput parameters the coefficients ranged from .04 to .08, which seems low for the materials present. The storage coefficient is the ratio of percent water volume a material yields due to gravity to the total volume of material.

Huntley (1979) on the other hand cites Loetz and others (1975) who measured a range from .35 to .41. These values appear much too high. Based on materials described in well logs, a compromise value of .15 is probably a more realistic figure.

Reasonable estimates for both the transmissivity and storage coefficient allow an evaluation to be made of changes

taking place in the basin. In the case of the Ocotillo-Coyote Wells basin, the aquifer dewatering in the cones of depression amounts to about 100 acre-feet of water. This estimate is based on the dewatering caused by a single well pumping the entire amount of water extracted in the basin in 1975. The assumptions made were:

Transmissivity	=	1,000 ft/day (10,000 gal/day/ft
Storage Coefficient	=	0.15
Well Yield	=	550 gallons/minute
Time Pumped	=	365 days

Considering that the actual wells are not pumping continuously and are scattered around the basin, the net effect of withdrawal in any area will be minimal and possibly less than that calculated.

PUMPAGE

Groundwater extraction in 1975 has been estimated at 800 acre-feet (Table 1). This figure has not been updated since the Skrivan report was released. Approximately 90 percent of the pumpage occurred in the Ocotillo-Coyote Wells area. There does not appear to have been a significant change in the extraction within the basin since then.

Table 1 1975 Groundwater Pumpage

	Pumpage (ac-ft)	% Total
U. S. Gypsum	600	68.2
McDougall	120	13.6
Mutual Water Companies	100	11.4
Domestic Use	60	6.8
	880	100.0

It is necessary to note that over 80 percent of the pumpage is exported from the basin. This figure is based upon different boundaries than the political basin boundaries which are currently accepted. The northern and eastern edges should be redefined to terminate the basin at the Elsinore fault as the water east of the fault is generally of an unusable quality.

With this new definition of the basin, all extractions by U.S. Gypsum must be considered as exports, because the water is taken across the fault into the poor quality, unusable area. Any percolation of process water east of the fault should not be considered recharge to the Ocotillo-Coyote Wells basin.

There has never been any question that the water trucked to Mexico is not an export. No further discussion of this water export is necessary.

The remaining pumpage is confined to the basin. This pumpage consists of the domestic well and mutual water company extractions. Some portion of this water is returned to the basin through recharge of septic tank effluent and percolation of excess irrigation water.

WATER LEVELS

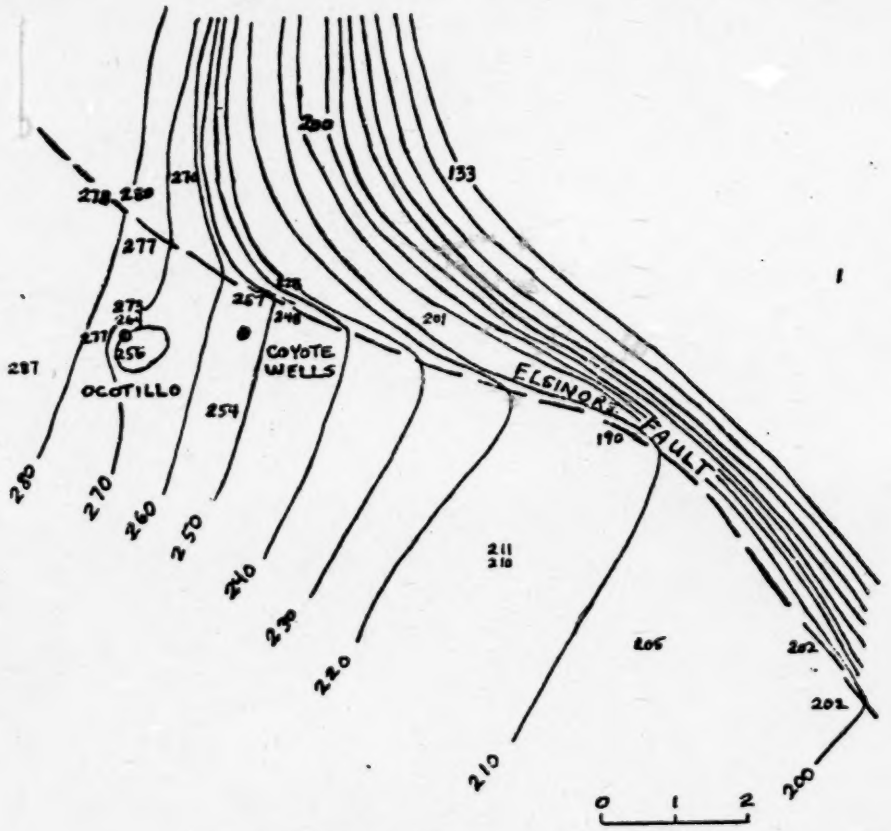
Basin groundwater levels have remained essentially at the same elevation between 1975 and May, 1980 (Figure 2, 3, and 4). The exceptions to this are the pumping cones near Ocotillo, Coyote Wells, and the Yuha Estates areas.

Comparison of the annual high water level data indicates that over half of the wells show a five year change of less than one foot plus or minus the 1975 level (Figure 5). Of the wells showing a water table lowering greater than one foot, all wells except one are in the area of the above mentioned pumping cones. The one exception is east of the Elsinore fault and its fluctuation cannot be accounted for.

The annual high water level was selected because it represents the change in storage in the aquifer. This level is least affected by seasonal fluctuations caused by pumping and evapo-transpiration. Since level measurements are only made semi-annually, the water level measured probably is not the seasonal high but should be close enough for reasonable analysis.

Water elevation contour maps show higher water levels on the west side of the Elsinore fault when compared to the east side Figure 2, 3, 4). This water level difference decreases northwesterly along the fault to an area where the levels are the same about one and one half miles north of Coyote Wells. At a point two miles north of Ocotillo, the USGS measurements indicate the poor quality water surface east of the fault is 1.7 feet higher in well 165/9E-24B1 than in well 165/9E-24D1 on the west side.*

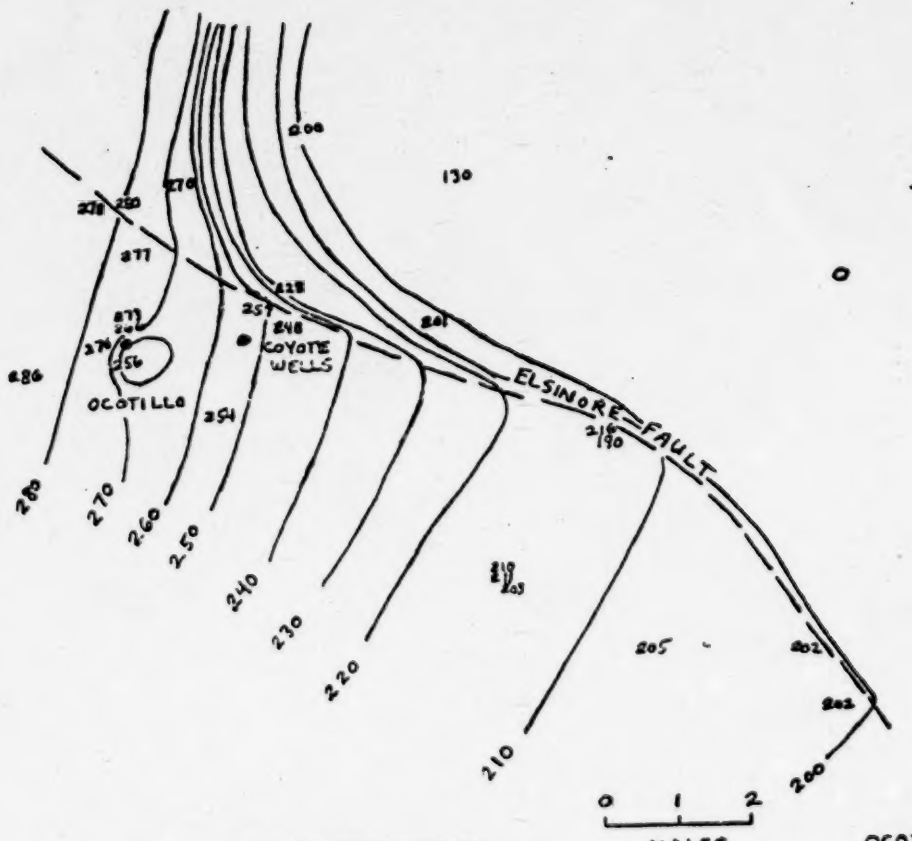
*A word of caution is necessary when looking at the USGS water levels. Some of the well surface elevations were estimated from topographic maps with twenty or forty foot contour intervals. This method for determining elevations could easily result in errors amounting to several feet, which might significantly alter the interpretation of the water level data. If greater accuracy is desired, well elevations should be surveyed in as soon as possible.



210 WATER ELEVATION
--- FAULT
CONTOUR INTERVAL 10 FEET

OCOTILLO-COYOTE WELLS
GROUND WATER ELEVATIONS
1975-1976

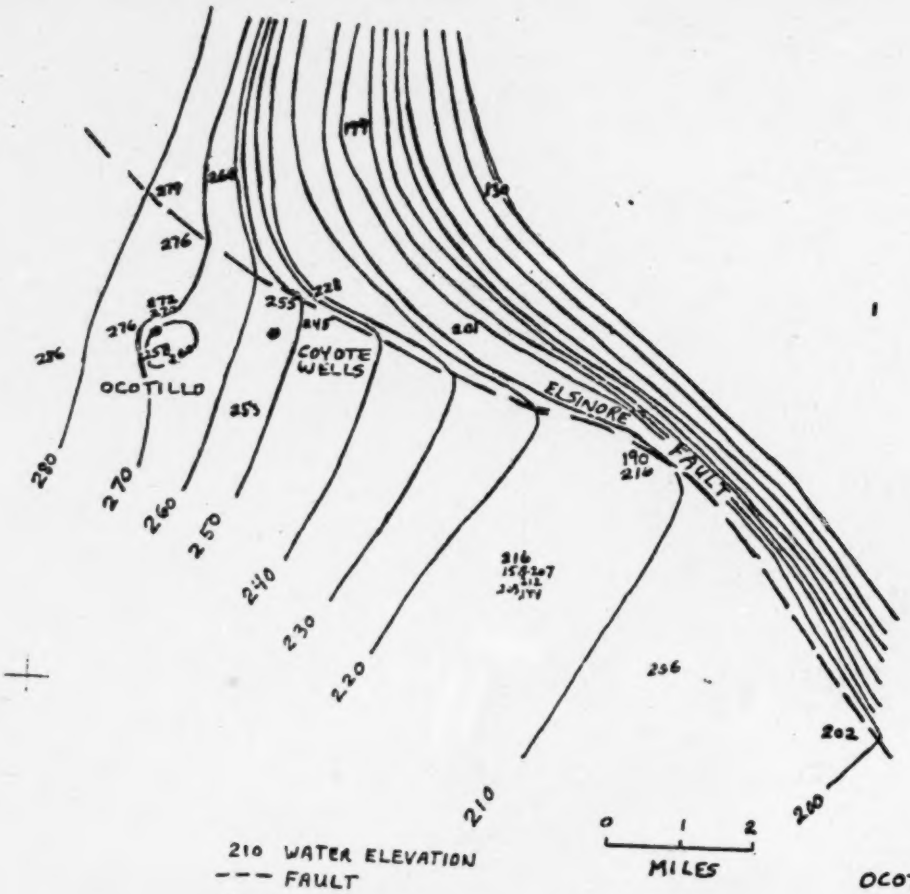
Figure 2.



210 WATER ELEVATION
--- FAULT
CONTOUR INTERVAL 10 FEET

OCOTILLO-COYOTE WELLS
GROUND WATER ELEVATIONS
1977-1978

Figure 3.



OCOTILLO-COYOTE WELLS
GROUND WATER ELEVATIONS
MAY 1980

Figure 4.

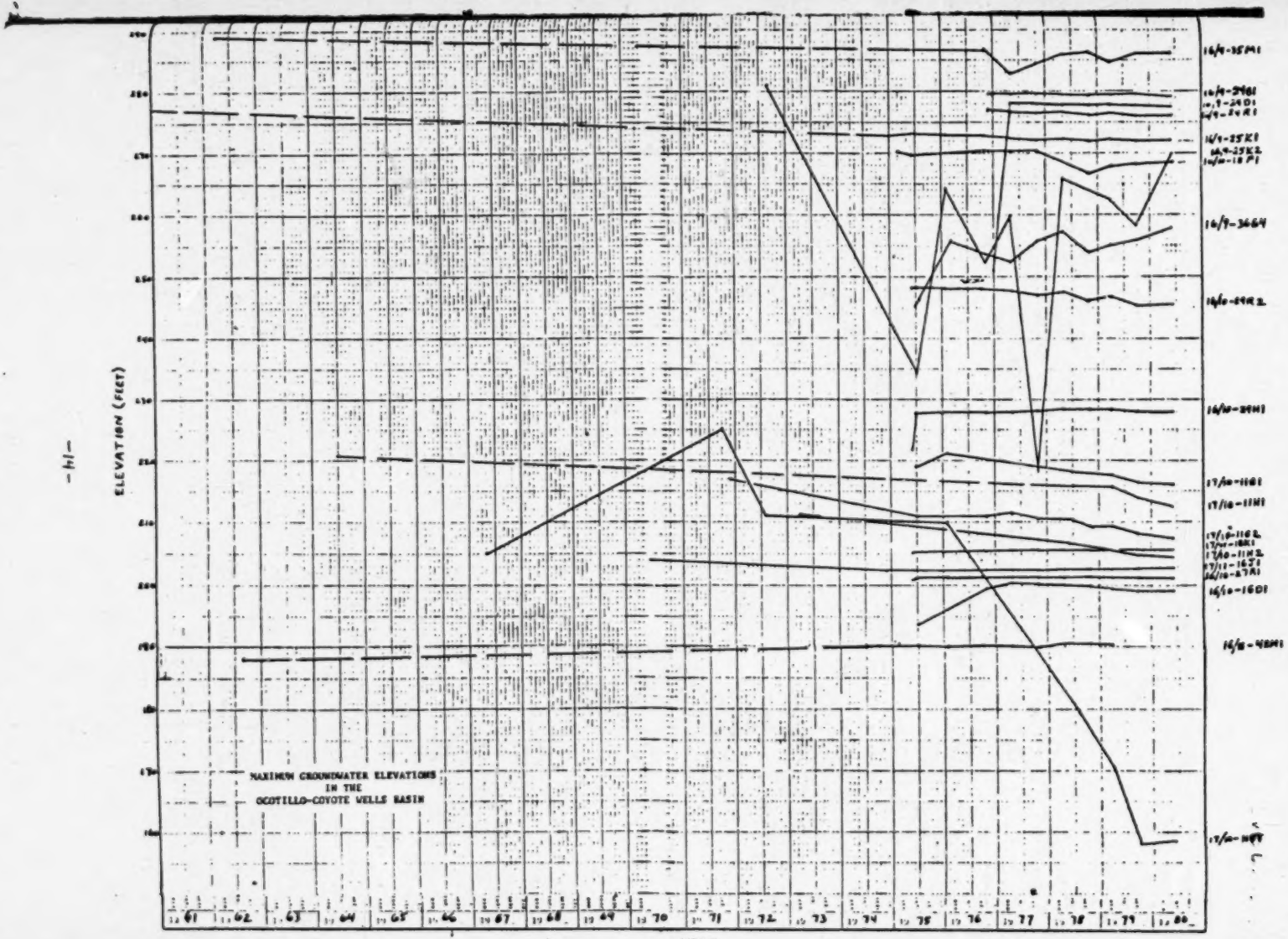

ELEVATION (FEET)
YEAR
MAXIMUM GROUNDWATER ELEVATIONS
IN THE
OCOTILLO-COYOTE WELLS BASIN
16/9-35M1
16/9-24R1
16/9-25K1
16/9-36G4
16/10-19M1
17/10-11G1
17/10-11H1
16/10-16D1
16/8-4BM1

FIGURE 5.

WATER QUALITY

The basin contains three distinct water quality types which are present in layers. There is a shallow sodium-chloride (Na-Cl) water, the main sodium-bicarbonate (Na-HCO_3) aquifer water, and the deep sodium-sulfate Na-SO_4) water. The latter is similar to the water type east of the Elsinore Fault. The three water types are kept separate by the lack of mixing in the basin. There do not appear to be any aquicludes in the aquifer system.

The shallow Na-Cl water was identified in several old dug wells (Skriven, 1977) and also can be seen on the water quality cross-section (Figure 7). Since this water type was found as early as 1925, prior to most development, it can be assumed to be naturally ocurring. Possibly the high salt content is the result of evaporation at the water table concentrating the salt content in the remaining water.

The intermediate water, the main aquifer in the basin, is an excellent quality water. It is suitable for all uses with no undesirable constituents, other than sporadic fluoride. The source and distribution of the fluoride could not be determined from the data available.

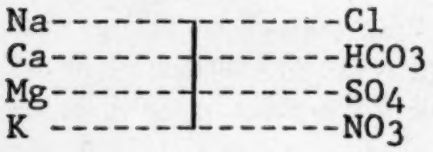
The deep poor quality water is assumed to underlie most of the main aquifer for two reasons. First, its existence was confirmed in an old gas exploration well in the southern portion of the basin. The base of freshwater was called at a depth of 515 feet below ground surface. Second, the geology at depth is probably marine containing unflushed connates. None of the water quality analyses reflect the deep water quality.

The water quality in the basin has been characterized using Stiff diagrams. The Stiff diagram is a graphical representation of chemical water analysis. Through the use of these diagrams, general water types can be determined and anomalies easily detected.

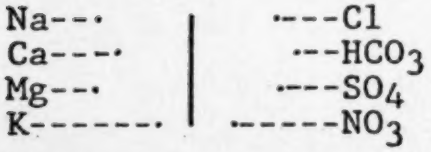
Basically, the technique utilizes the equivalents per million (epm) values for the major cations and anions in a chemical analysis. Although not restricted to these ions, sodium (Na), calcium (Ca), magnesium (Mg), and potassium (K) are the cations used and chloride (Cl), bicarbonate (HCO_3), sulfate (SO_4), and nitrate (NO_3) are the anions used in this study.

The epm for these ions are plotted from a zero reference line (Figure 6a). These plots are then joined together to form the Stiff diagram (Figures 6b and 6c).

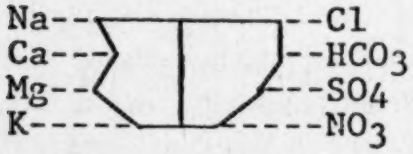
6a

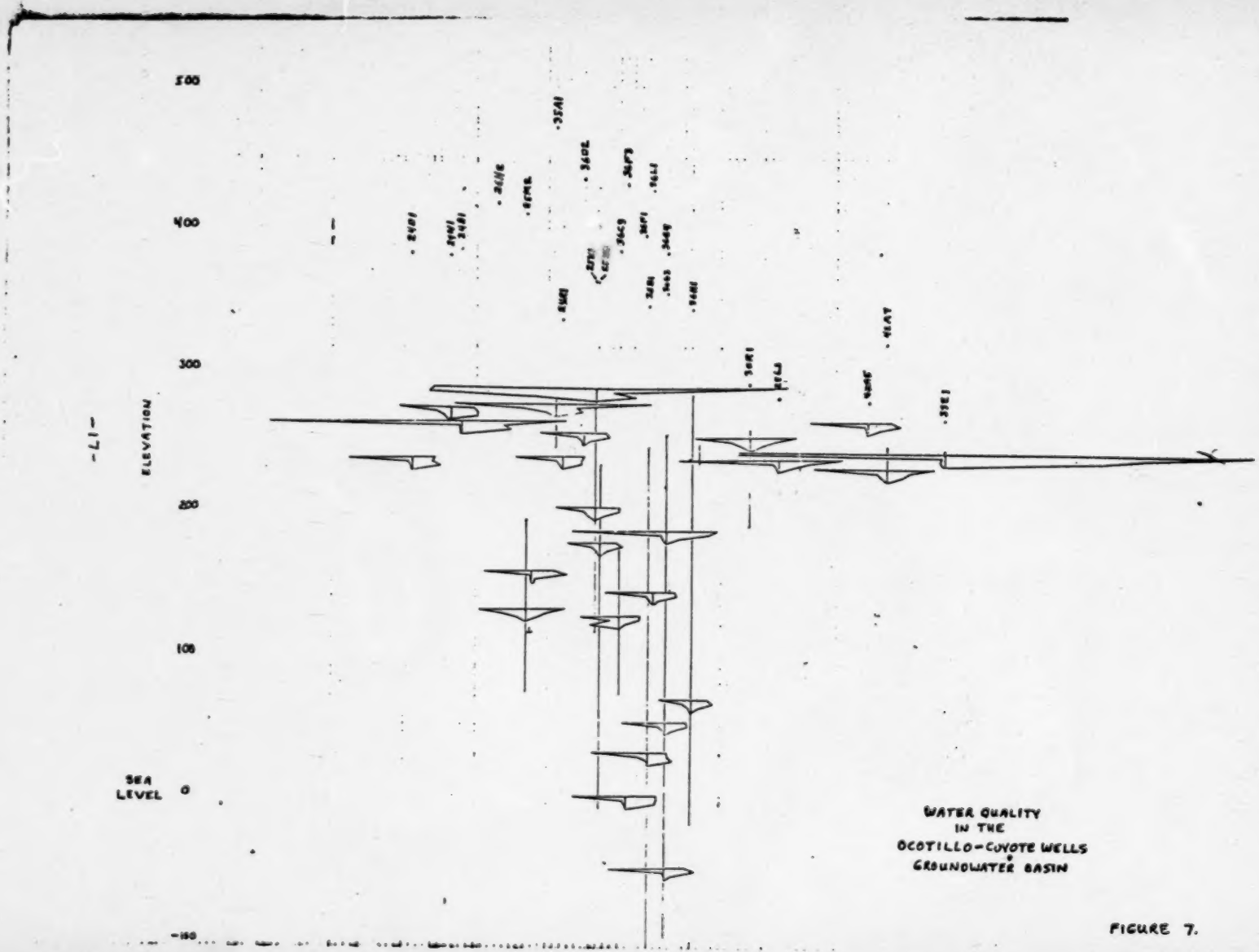


6b



6c





WATER QUALITY
IN THE
OCOTILLO-COYOTE WELLS
GROUNDWATER BASIN

FIGURE 7.

PROPOSED GROUNDWATER MONITORING NETWORKS

The USGS and DWR (letter of November 26, 1979) selected five locations for the placement of monitoring wells. These well locations do not consider the likelihood that degradation, if it occurs, will probably be from sources North of the Ocotillo-Coyote Wells area. Considering the new quality and level data, the proposed network should be reevaluated. No funding should be made until there is agreement on well locations, well design, and sequence of well construction.

CONCLUSIONS

1. Initiation of Section 2100 action at this time is inappropriate.
2. The basin is not in a critical overdraft condition.
3. Cones of depression in the Ocotillo, Coyote Wells, and Yuha Estates areas have resulted in well interference.
4. The proposed well locations for the USGS-DWR monitoring network are not adequately sited based on new information obtained in this study.
5. The Elsinore fault should constitute the eastern boundary for the groundwater basin.
6. The U.S. Gypsum Co. and the McDougall wells export over 80 percent of the total basin pumpage.
7. Groundwater quality in the basin has not been significantly degraded.
8. The effect of above average precipitation in the watershed during the last few years could not be determined with the existing data collection program.
9. Hydrographs do not show the effects of recharge from precipitation.

10. Additional export of water from the areas affected by well interference will only intensify the problem.

11. Deepening of the pumping cones may induce poor quality water upward from the deeper zones.

12. Base of fresh water is at approximately a minus 500 feet below ground surface level in the southern portion of the basin.

13. Water levels in the basin, with the exception of the interference pumping cones, have changed less than one foot during the last five years of record.

14. The lack of surveyed well elevations may effect the analysis of the water level data to some extent.

RECOMMENDATIONS

1. Do not initiate Section 2100 action at this time.
2. Continue existing water quality and level monitoring.
3. Reevaluate the proposed USGS-DWR monitoring well ocations.
4. Fund an appropriate share for the construction of monitoring wells.
5. Survey in elevations of all water level monitoring wells.
6. Reevaluate boundaries of the Ocotillo-Coyote Wells groundwater basin using geologic rather than political factors.
7. Reevaluate the effect of the U.S. Gypsum water export from the basin on possible water rights litigations.
8. Look into options to redistribute pumpage away from pumping cones of depression.
9. Restrict additional pumpage in areas showing significant well interference.

EXHIBIT "C".

Reunion de la Comision
de las Californias

COMMISSION OF THE CALIFORNIAS
ENVIRONMENTAL COMMITTEE
CABO SAN LUCAS
APRIL 23, 24, 25, 1980
BAJA, CALIFORNIA SUR

RESOLUTION

WHEREAS, at the meeting in La Paz in April 1979, a Resolution was passed indicating support for the continued distribution of potable water to the City of Mexicali from Imperial County wells.

WHEREAS, there is now pending before the U.S. Supreme Court the issue as to whether this distribution may continue.

WHEREAS, due to the importance to the community of Mexicali for the continued availability of potable water, the Commission of the Californias requests that proper attention, and if necessary, legal intervention by appropriate Federal authorities in this action be taken.

THEREFORE BE IT RESOLVED, that the Environmental Committee of the Commission of the Californias, after thorough discussion and evaluation, requests the unanimous agreement of the General Assembly of the Commission that appropriate communication be generated through the offices of the respective chiefs of delegation of the Commission of the Californias to the Secretary of State of the United States.

BE IT FURTHER RESOLVED, that this Commission recognizes the importance of the availability of potable water to the City of Mexicali. To this purpose the Committee

requests, if necessary, the intervention of the office of the Secretary of State of the United States in support of an action pending in the United States Supreme Court (Case No. 79-1003) relative to the right of the Mexican Nationals to purchase water in the United States for use in the community of Mexicali.

(Passed April 25, 1980 by unanimous vote of the commission.)

abril de 1980.

EXHIBIT "D".

In the Supreme Court of the United States.

County of Imperial and the Supreme Court of California in and for the County of Imperial, Petitioners, vs. Guillermo Gallego Munoz, Humberto Martinez, Juan De Leon, Respondents. Case No. 79-1003, Stipulation to Filing of Amicus Brief.

Received: Mar. 17, 1980.

Pursuant to the revised rules of the Supreme Court of the United States Rule Number 422), it is hereby stipulated between the parties that DONALD C. McDOUGAL, a Defendant in the above-entitled action, may file an Amicus Curiae Brief in the above-entitled case notwithstanding the fact that he is not a party to the present appeal.

DATED: April 8, 1980.

/s/ James H. Harmon
James H. Harmon, County Counsel
for Petitioner, County of Imperial
and the Superior Court of California
for the County of Imperial

DATED: 4-22-80

/ s/ W. H. Kronberger
William H. Kronberger, Attorney for
Respondents Guillermo Gallego Munoz,
Humberto Martinez & Juan De Leon.